CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 399

SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

MRS. OLIVIA COX LUNSFORD, AS ADMINISTRATRIX OF THE ESTATE OF J. M. COX, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED AUGUST 27, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No.

SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

MRS. OLIVIA COX LUNSFORD, ADMINISTRATRIX OF THE ESTATE OF JAMES MONROE COX.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

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SUPREME COURT OF GEORGIA

ORDER TRANSFERRING CASE—May 19, 1934

Atlanta, May 19, 1934.

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

SOUTHERN RAILWAY CO.

v.

O. C. LUNSFORD, ADMX.

It is ordered that this case be hereby transferred to the Court of Appeals. Bill of costs, $10.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 2] IN SUPERIOR COURT OF HARALSON COUNTY

July Term, 1933

No. 2229

MRS. OLIVIA COX LUNSFORD, Administratrix of Estate of James Monroe Cox,

vs.

SOUTHERN RAILWAY COMPANY

BILL OF EXCEPTIONS AND ORDER—Filed May 1, 1933

STATE OF GEORGIA,
Haralson County:

Be it remembered, that on the 12th day of April, 1935, Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James Monroe Cox, filed her suit against the Southern Railway Company in the Superior Court of Haralson County, Georgia, said suit being Numbered 2229 and made returnable to the July Term, 1933, of said Court; said suit being a

suit brought in two counts for the sum of Fifty Thousand Dollars ($50,000.00) on account of the death of James Monroe Cox, alleged to have been caused by the negligence of the defendant; that thereafter, within the time provided by law, and on August 16th, 1933, the defendant filed its answer and demurrer to the petition filed in said case; as shown by the record in said case; that thereafter, on November 18th, 1933, plaintiff amended said petition, which amendment was allowed on November 18th, 1933, and thereafter said petition as amended and the demurrer thereto came on to be heard before the Superior Court of said County, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, and that thereafter, and within the time allowed by law and the rules of Court, defendant, Southern Railway Company, tendered its bill of exceptions pendente lite, excepting to and assigning error upon each and all of said rulings of the Court, which said bill of exceptions pendente lite, after being duly certified and approved by the trial Judge, was filed as a part of the record in said case on the [fol. 3] 14th day of December, 1933; and the defendant, Southern Railway Company, (Plaintiff in Error in this bill of exceptions), assigns error upon its said bill of exceptions pendente lite and says that the Court erred in each and all of the rulings complained of therein for the various reasons assigned with reference thereto respectively.

Be it further remembered, that thereafter, on December 14th, 1933, plaintiff amended her petition by an amendment allowed, subject to demurrer, on said 14th day of December, 1933, and filed on January 15th, 1934; to said amendment so filed the defendant, Southern Railway Company, filed its demurrer on January 15th, 1934, which demurrer to the amendment came on to be heard before the Superior Court of Haralson County, Georgia, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, and that thereafter, and within the time allowed by law and the rules of Court, defendant, Southern Railway Company, tendered its bill of exceptions pendente lite, excepting to and assigning error upon each and all of said rulings of the Court, which said bill of exceptions pendente lite, after being duly certified and approved

by the trial Judge, was filed as a part of the record in said case on the 22nd day of January, 1934; and the defendant, Southern Railway Company, (Plaintiff in Error in this bill of exceptions), assigns error upon its said bill of exceptions pendente lite and says that the court erred in each and all of the rulings complained of therein for the various reasons assigned with reference thereto respectively.

Be it further remembered, that thereafter said case came on to be tried in the Superior Court of Haralson County, Georgia, at the regular January Term, 1934, of said Court, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and on January 16th, 1934, a jury was [fol. 4] stricken and evidence introduced in behalf of the plaintiff and the defendant, and, after argument of counsel and charge of the Court, the jury retired and returned a verdict in favor of the plaintiff in the sum of five Thousand Dollars ($5,000.00), and judgment was duly entered thereon; that thereafter, within the time provided by law, and within thirty days from the date of said verdict and judgment, and on the 22nd day of January, 1934, the defendant filed its motion for new trial in said case, and rule nisi was duly issued thereon; that thereafter, in accordance with the orders of court in said rule nisi, and on the 5th day of April, 1934, movant had approved and filed a brief of the evidence delivered on the trial of said case, and on said date of April 5th, 1934, filed a copy of the charge of the court delivered on the trial of said case, which charge of the court was approved on April 5th, 1934, and on said date of April 5th, 1934, had approved and allowed an amendment to said motion for new trial, which was filed on April 5th, 1934, all as appears of record in said case.

Be it further remembered, that thereafter said motion for new trial as amended came on to be heard in the Superior Court of Haralson County, Georgia, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said motion for new trial as amended, which order of court overruling said motion for new trial as amended was entered on the 5th day of April, 1934.

To this order of court overruling said motion for new trial as amended, the defendant, Southern Railway Company, movant in said motion, then and there excepted and now excepts, and assigns the same as error, and says that

the Court erred in overruling said motion for new trial as amended on each and all of the grounds therein stated.

The plaintiff in error in this bill of exceptions, Southern [fol. 5] Railway Company, tenders this its bill of exceptions, in which it names itself as Plaintiff in Error, and names Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James Monroe Cox, as Defendant in Error.

* * * * * * *

Plaintiff in Error in this bill of exceptions specifies as material to a clear understanding of the errors complained of the following portions of the record in said case, to-wit:

1st. The original petition in said case, filed on the 12th day of April, 1933.

2nd. The original answer of the defendant in said case, filed on August 16th, 1933.

3rd. The defendant's demurrer to the plaintiff's petition, filed on August 16th, 1933.

4th. The first amendment to plaintiff's petition, filed on November 18th, 1933.

5th. The order on defendant's demurrer, entered on the 18th day of November, 1933.

6th. The bill of exceptions pendente lite, filed by the defendant on the 14th day of December, 1933.

7th. The second amendment to plaintiff's petition, allowed on December 14th, 1933, and filed on January 15th, 1934.

8th. Defendant's demurrer to plaintiff's second amendment to her petition, allowed on December 14th, 1933, and filed on January 15th, 1934, which said demurrer was filed on January 15th, 1934.

9th. The order on defendant's demurrer to plaintiff's second amendment to her petition, entered on the 15th day of January, 1934.

10th. The bill of exceptions pendente lite, filed by the defendant on the 22nd day of January, 1934.

11th. The verdict of the jury rendered in said case on the 16th day of January, 1934.

[fol. 6] 12th. The judgment of the Court on said verdict, dated the 16th day of January, 1934.

13th. The motion for new trial filed by defendant on the 22nd day of January, 1934, with rule nisi and acknowledgment of service thereon.

14th. The brief of the evidence with the order and entries thereon, filed on the 5th day of April, 1934.

15th. The amended motion for new trial in said case, with the approval of the Judge thereon, filed in said case on the 5th day of April, 1934.

16th. The order of Court overruling said motion for new trial as amended, entered on the 5th day of April, 1934.

17th. The charge of the Court with the approval of the Judge thereon, dated the 5th day of April, 1934, and filed on the 5th day of April, 1934.

18th. The entries of filing of each and all of the parts of the record above specified to be entered and transmitted in the proper order.

And now, within the time provided by law, and within thirty days of the entry of the judgment overruling said motion for new trial as amended, comes the defendant, Southern Railway Company, and tenders this its bill of exceptions and prays that the same may be certified as provided by law, in order that the errors complained of may be considered and corrected by the Supreme Court of the State of Georgia.

This the 25th day of April, 1934.

Griffith & Matthews, Maddox, Matthews & Owens, P. O. Addresses: Buchanan, Georgia, Rome, Georgia, Attorneys for Southern Railway Company, Plaintiff in Error in this Bill of Exceptions.

[fol. 7] I do certify that the foregoing bill of exceptions is true, and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Haralson County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Supreme Court of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

This the 25th day of April, 1934.

J. R. Hutcheson, Judge of the Superior Court of Haralson County, Georgia.

Due and legal service of the within bill of exceptions ac-

knowledged, copy and all other and further notice or service hereby waived.

This the 25 day of April, 1934.

Arnold, Gambrell & Arnold, —— ——, P. O. Addresses: Buchanan, Georgia, Atlanta, Georgia, Attorneys for Mrs. Oliver Cox Lunsford, Administratrix of Estate of James Monroe Cox, Defendant in Error in this Bill of Exceptions.

[fol. 8] Clerk's certificate to foregoing paper omitted in printing.

[File endorsements omitted.]

[fol. 9] In Superior Court of Haralson County

Petition—Filed April 12, 1933

First Count

Georgia,
Haralson County:

To the Superior Court of said County:

The petition of Mrs. Olivia Cox Lunsford, who brings this action as administratrix of the estate of James Monroe Cox, shows to the court the following case:

1. Plaintiff is administratrix of the estate of James Monroe Cox, deceased, who will be hereinafter called the decedent.

2. The defendant in this action is Southern Railway Company, which is a railway corporation running a line of track and having an office and agent upon whom service of process can be made in said County, and the cause of action originated in the said County of Haralson.

3. The said defendant has endamaged plaintiff as administratrix of the estate of James Monroe Cox as aforesaid in the sum of Fifty Thousand Dollars ($50,000.00) on account of the case which will be hereinafter stated, and judgment is prayed against said defendant for said sum.

4. On the 14th day of February, 1933, the decedent, James Monroe Cox, was an engineer in the employment of the defendant and on that day he was engaged in interstate commerce and the defendant was engaged in interstate commerce, in that the decedent, as engineer, was driving a passenger train of the defendant from Birmingham, in the State of Alabama, to Atlanta, in the State of Georgia, the said train being known as eastbound passenger train number 40 of the defendant.

5. At about 10:30 o'clock A. M., which the decedent was so driving the engine of said passenger train in interstate commerce, and at a point approximately one and thirty-five one hundredths (1.35) mile west of the defendant's railway station at Bremen, Georgia, and while rounding a sharp curve on defendant's track, wheels of the front trucks [fol. 10] under the engine left the rails, but the engine, including all the drivers and other wheels thereof, remained on the track, and the engine continued to function apparently normally to the engineer and fireman, the said front trucks being entirely out of view to them and there being nothing to put them on notice that they had left the rails, and the construction of said engine being such, by means of chains, which suspended said trucks from the body of the engine, and other appliances, that the said front trucks could be off the rails and the engine still continue to function normally and there being nothing to put the engineer and fireman on notice that they were off the rails.

6. After wheels of said trucks under the front end of the engine left the rails the engine continued to run apparently normally, pulling the train as usual for a distance of seven tenths (0.7) of a mile until it reached a switch going out to the right from the main line, at which point the said trucks, with said front wheels attached thereto being off the track and dangling by means of said chains and other appliances from the front end of the engine, struck said switch, and the effect of striking said switch was to throw said trucks and wheels to one side and under the engine and obstruct their further progress along the track and to cause the engine as a whole to leave the rails and to become unbalanced and, after running about one hundred yards in this condition, to turn over, and in so turning over the steam and scalding water escaped from the same

and the decedent, James Monroe Cox, was so crushed, mangled, bruised, scalded and burned that he died as a result of said injuries within about one hour therefrom.

7. The defendant was negligent and failed to exercise ordinary care in all the particulars aforesaid and in the particulars which will now be stated, to-wit:

[fol. 11] 8. The death of said decedent, resulted because of defects and insufficiencies due to the defendant's negligence in its engines, appliances, track and road-bed.

9. The place of said initial derailment, one and thirty-five one hundredths (1.35) miles west of the station at Bremen, was around a very sharp curve, the track curving to the left in the direction in which the engine was going and the decedent being on the outside of the curve. The track did not have sufficient elevation on the right side going east to render it safe to propel an engine weighing in the neighborhood of two hundred tons, as did the engine in question, over said point. The said engine was proceeding at the regular schedule of speed of approximately thirty (30) miles per hour, and it is alleged that for an engine of that weight the elevation of the track was insufficient on said outside or right hand side of the direction in which it was going.

10. Plaintiff further alleges that at said initial point on said curve where the trucks got off the track the rails and track were not firm and secure but on the contrary the curve was very sharp and was insufficiently braced and the rails sat on iron plates on ties which were insufficiently spiked, it being alleged that on the outside of said rails said plates had openings or holes for two spikes which were necessary to give them a firm setting on the tie; whereon, at this point all of said plates had on the outside a spike in only one of said openings and failed to have a spike in the other opening, which was negligence and which made the track insecure and which allowed the said rails to yield to the pressure of a heavy train at said point, which caused a certain amount of looseness and vibration in the rail and caused the same to give at the top and to have a tendency to give and thus enable the flange of a wheel to ride over the rail at said point.

[fol. 12] 11. Plaintiff further alleges that at said initial point of derailment, one and thirty-five one hundredths

(1.35) miles from said station, the crossties were rotten and out of condition and failed to support firmly and securely the spikes driven through said plates to hold the rail in place, but on the contrary the rotten condition of said ties allowed said spikes to have play and room and the same were not tight and allowed the rail to vibrate and cause the top thereof to give and to allow the flange of a wheel to climb over the same.

12. Plaintiff further alleges that on account of the constant vibration and the rottenness of the ties at the time of said collision, the said spikes had worked up to a point above the flange of the rail and did not come in close and tight contact with the same so as to make the same secure, but on the contrary there was a space between the head of the spikes and the bottom flange of the rail which allowed play and vibration and looseness and insecurity in said rail and which had a tendency to and did cause the said front trucks to mount the outside of said rail and ride over the same.

13. It was the insufficiency of the out or bearing rail due to all of the causes aforesaid which caused said trucks to mount said outside or bearing rail and the right hand wheel went off on the outside of said bearing or outside rail and the left wheel went off on the inside.

14. The flanges of the front wheels of said engine were sharp and out of condition and the shop authorities of the defendant were negligent in allowing the same to go in service on said day.

15. Plaintiff further alleges that said engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances, and other [fol. 13] apparatus under the body of said engine extending from the back to the front end thereof, and consisting of cylinders, valves and other apparatus, including air, and which automatically, whenever said front wheels of said engine should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, to apply the air on the brakes of the entire train, and had said appliance known as a watchman been in repair, the movement of said train at said point would have been stopped in a couple of hundred yards, which would have

been automatic and without any effort on the part of the engineer, but the defendant, on said occasion, before said engine left Birmingham, Alabama, failed to properly inspect said watchman to see that the same was in condition to work, and plaintiff alleges that the same was not in working or functioning order at the time of said derailment and the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection under the body of said engine and had ascertained that said watchman was in repair before said trip from Birmingham to Atlanta. The same was not the duty of the decedent who had no concern or part therewith. Had the said watchman functioned, the train would have been stopped long before striking said right hand switch and turning over and the life of the decedent would have been saved.

16. Plaintiff also alleges that at a point about 25 or 35 feet west of the switch which turned to the right and at which point the engine began to turn over and finally did turn over, the cross ties were rotten and not securely ballasted and that the spikes were almost out of the plates and the rail was not secure, all of which contributed to the said final derailment after the engine had run said seven-tenths (0.7) of a mile.

[fol. 14] 17. On account of each and all of the foregoing negligent acts and omissions of the defendant and on account of each and all of the defective and insufficient conditions of the defendant's engines, appliances, machinery, track and road-bed, due to its negligence, the said derailment and turning over of said engine and consequent death of the decedent occurred.

18. Plaintiff brings this action under the Act of Congress of April 22, 1908, and all subsequent amendments thereto, regulating the liability of carriers engaged in interstate commerce to their employees, and plaintiff alleges that the said decedent was a widower, his wife having died several years before the decedent's death, and the said decedent left surviving him two children, one of whom is the plaintiff, Mrs. Olivia Cox Lunsford, and the other of whom is Hubert A. Cox, the said two children being his only surviving children. Plaintiff alleges that the decedent's life was of great value to the said children, and this action is

brought by plaintiff as administratrix for the benefit of said children. The decedent was 59 years of age and had an expectancy in life of 14.92 years. His earnings were about $325,00 per month and said earnings would have continued throughout his entire expectancy. The said decedent contributed out of his said earnings for the benefit of his two surviving children the sum of $200.00 per month, which contributions would have kept up until his death, said contributions being in money, in services, in house rent, in contributions of property, groceries, automobiles, furniture, and in payment to employees for services rendered said two children. The said decedent was healthy and able-bodied and had no one on whom, outside of his own personal expenses, to spend his money except said two children, and damages are laid at the aforesaid sum of $50,000.00.

[fol. 15] Wherefore plaintiff prays process may issue requiring the defendant to be and appear at the next term of this court to answer plaintiff's complaint.

Arnold, Arnold & Gambrell, Attorneys for Plaintiff.

And for further cause of action and by way of an additional count plaintiff says:

Second Count

GEORGIA,
Haralson County:

To the Superior Court of said County:

The petition of Mrs. Olivia Cox Lunsford, who brings this action as administratrix of the estate of James Monroe Cox, shows to the court the following case:

1. Plaintiff is administratrix of the estate of James Monroe Cox, deceased, who will be hereinafter called the decedent.

2. The defendant in this action is Southern Railway Company, which is a railway corporation running a line of track and having an office and agent upon whom service of process can be made in said county, and the cause of action originated in the said County of Haralson.

3. The said defendant has damaged plaintiff as Administratrix of the Estate of James Monroe Cox as aforesaid in

the sum of Fifty Thousand Dollars ($50,000.00) on account of the case which will be hereinafter stated, and judgment is prayed against defendant for said sum.

4. On the 14th day of February, 1933, the decedent, James Monroe Cox, was an engineer in the employment of the defendant and on that day he was engaged in interstate commerce, in that the decedent, as engineer, was driving a passenger train of the defendant from Birmingham, in the State of Alabama, to Atlanta, in the State of Georgia, the said train being known as eastbound passenger train number 40 of the defendant.

[fol. 16] 5. On said 14th day of February, 1933, while the decedent as engineer in interstate commerce was driving from Birmingham, Alabama to Atlanta, Georgia a passenger train of defendant known as number 40, and when said engine reached a point one and thirty-five one hundredths (1.35) miles west of the station at Bremen, Georgia, the train going in an easterly direction, the front trucks of said engine struck a rock or other object negligently allowed by the defendant to be on said track and adjacent to the rails thereof and especially the outside or bearing rail, and upon striking said rock the said front trucks were derailed.

6. It is alleged that the defendant was negligent in allowing said rock or other obstruction adjacent to and on said rails to be at said time and place on said track.

7. The defendant's section hands the section foreman at said point were negligent in failing to properly inspect said track at said point as the said curve was very acute and dangerous and as said rock or obstruction had remained on said track for upwards of one hour before said train passed in close proximity to said station at Bremen, Georgia.

8. It is further alleged that the curve was to the left at said place, and had been for three hundred yards, and the engineer was on the outside of the curve and had no opportunity to see the track any distance ahead of the engine; whereas, the fireman on said engine was on the inside of the curve, and said engine was provided with an automatic stoker which fired the same by machinery and required only the turning of valves, and at the time of said initial derailment of said front trucks the fireman had no other duty to

perform than to look out on his side of the engine and in the exercise of ordinary care should have looked out on his side of the engine as that was the only side from which the [fol. 17] track could be seen, it being on the inside of the curve, and in the exercise of ordinary care the said fireman could and should have discovered said rock on said track and adjacent to said rail and on top of said right hand rail (in the direction in which the train was going) and yet said fireman negligently failed to discover the same and negligently failed to warn the engineer of said obstruction, and had said fireman discovered said rock and warned said engineer at a distance of one hundred or more yards away, when he could have discovered said rock as the same was then visible, the said decedent would have been enabled to apply his brakes and stop the train before it finally left the track.

9. It is alleged that after striking said rock the front trucks left the rails but the engine was not derailed and continued to function apparently normally to the engineer and fireman was a distance of seven tenths (0.7) of a mile, at which point it struck a switch going out to the right from the track and in so striking the switch the front trucks were turned to the right and were obstructed and caused to be thrust under the engine, and this, together with the large axles and wheels of said trucks and its general obstruction in turning to the right on striking said switch, threw the entire engine off the track and caused it to turn over on its side after running about one hundred yards.

10. Plaintiff further alleges that said engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances, and other apparatus under the body of said engine extending from the back to the front end thereof, and consisting of cylinders, valves and other apparatus, including air, and which automatically, whenever said front wheels of said engine should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, [fol. 18] to apply the air on the brakes of the entire train, and had said appliance known as a watchman been in repair, the speed of said train at said point would have stopped at a couple hundred yards, which would have been automatic and without any effort on the part of the engi-

neer, but the defendant on said occasion, before said engine left Birmingham, Alabama, failed to properly inspect said watchman to see that the same was in condition to work, and plaintiff alleges that the same was not in working or functioning order at the time of said derailment and the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection under the body of said engine and had ascertained that said watchman was in repair before said trip from Birmingham to Atlanta. The same was not the duty of the decedent who had no concern or part therewith. Had the said watchman functioned, the train would have been stopped long before striking said right hand switch and turning over and the life of the decedent would have been saved.

11. Plaintiff also alleges that at a point about 25 or 35 feet west of the switch which turned to the right and at which point the engine began to turn over and finally did turn over, the cross ties were rotten and not securely ballasted and that the spikes were almost out of the plates and the rail was not secure, all of which contributed to the said final derailment after the engine had run said seven-tenths (0.7) of a mile.

12. Each and all of the foregoing negligent acts and omissions of said fireman and the defendant's other agents and servants herein described, and the defective conditions of defendant's engines, appliances, machinery and cars, due to its negligence, contributed to and caused the turning over of said engine and the escape of steam, fire and water therefrom and the crushing, mangling and killing of the dece- [fol. 19] dent, James Monroe Cox, who died from the injuries received after the turning over of said engine and because of said turning over within one hour therefrom.

13. Plaintiff brings this action under the Act of Congress of April 22, 1908, and all subsequent amendments thereto, regulating the liability of carriers engaged in interstate commerce to their employees, and plaintiff alleges that the said decedent was a widower, his wife having died several years before the decedent's death, and the said decedent left surviving him two children, one of whom is the plaintiff, Mrs. Olivia Cox Lunsford, and the other of whom is Hubert A. Cox, the said two children being his only surviving chil-

dren. Plaintiff alleges that the decedent's life was of great value to said children, and this action is brought by plaintiff as administratrix for the benefit of said children. The decedent was 59 years of age and had an expectancy in life of 14.92 years. His earnings were about $325.00 per month and said earnings would have continued throughout his entire expectancy. The said decedent contributed out of his said earnings for the benefit of his two surviving children the sum of $200.00 per month, which contributions would have kept up until his death, said contributions being in money, in services, in house rent, in contributions of property, groceries, automobiles, furniture, and in payment to employees for services rendered said two children. The said decedent was healthy and able-bodied and had no one on whom, outside of his own personal expenses, to spend his money except said two children, and damages are laid at the aforesaid sum of $50,000.00.

Wherefore plaintiff prays process may issue requiring the defendant to be and appear at the next term of this court to answer plaintiff's complaint.

Arnold, Arnold & Gambrell, Attorneys for Plaintiff.

[fol. 20] In Superior Court of Haralson County

Summons and Sheriff's Return—Filed April 12, 1933

To the Sheriff of said County and His Lawful Deputies—Greeting:

Mrs. Olivia Cox Lunsford, Administratrix of Estate of James Monroe Cox

vs.

Southern Railway Company

Complaint for Damages

The defendant, Southern Railway Company, is hereby required personally or by attorney to be and appear at the Superior Court, to be held in and for said County on the 3rd Monday in July next, then and there to answer the Plaintiff's demand in an action of complaint, as in default

thereof the Court will proceed as to justice shall appertain.

Witness the Honorable J. R. Hutcheson, Judge of the said Court, this 12 day of April, 1933.

S. O. Smith, Clerk.

I have this day served the defendant, Southern Railway Company, a corporation, by serving copy of within petition and process personally upon R. L. Fields depo- agent of the said defendant, Southern Railway Company, at Bremen, Haralson County, Georgia, at the usual and ordinary place of doing business of said corporation in said County of Haralson, State of Georgia.

This 14 day of April, 1933.

L. J. White, Sheriff.

Filed in office April 12th, 1933.

S. O. Smith, Clerk.

[fol. 21] In Superior Court of Haralson County

Original Answer of the Defendant—Filed Aug. 16, 1933

Now comes Southern Railway Company defendant in above stated cause, and, in answer to the petition, says:

1st. For the want of sufficient information, defendant can neither admit nor deny the averments of the first paragraph of the first count of the petition.

2nd. The averments of the second paragraph of the first count of the petition are admitted.

3rd. The averments of the third paragraph of the first count of the petition are denied.

4th. The averments of the fourth paragraph of the first count of the petition are admitted.

5th. Answering the averments of the fifth paragraph of the first count of the petition this defendant says that at or about the time and place stated, and while rounding a curve on defendant's tracks, the wheels of the front truck of the engine struck a rock which had been placed on the track

by someone without the knowledge of this defendant or any of its employees, and were thrown from the rails, while the drivers and other wheels of said engine remained on the track. The said front trucks were out of view of the engineer and fireman, and said trucks were suspended in such a way that they could be suspended from the body of the engine and the engine still continue to function normally for a short distance. Except as answered it can neither admit nor deny the averments of said fifth paragraph of the first count of the petition for the want of sufficient information.

6th. Answering the sixth paragraph of the first count of the petition, this defendant says that its investigation of the condition after the derailment of said engine showed that after the wheels of said trucks under the front end of the engine left the rail it ran for a distance of approximately seven tenths (7/10) of a mile until it reached a switch going out to the right from the main line, at which point [fol. 22] said engine was derailed and turned over. Apparently said front wheels of said truck were off the track from the time the same struck the rock as hereinbefore referred to, and apparently when said front wheels struck the switch they were thrown to one side, and derailed and turned over the engine. In said derailment, James M. Cox, the engineer in charge of said engine, was so injured that he died within about one hour. Except as answered, the averments of said paragraph can neither be admitted nor denied for the want of sufficient information.

7th. The averments of the seventh paragraph of the first count of the petition are denied.

8th. The averments of the eighth paragraph of the first count of the petition are denied.

9th. Answering the ninth paragraph of the first count of the petition, defendant says that said trucks struck said rock on the track at a point approximately one and thirty-five hundredths (1.35) miles west of the station at Bremen on a rather sharp curve to the left in the direction in which the engine was going, and it assumes that the decedent was on his seat box on the right side of the engine, which would have placed him on the outside of the curve. Its information is that said train was proceeding at the regular sched-

ule of speed. Except as answered, the averments of said ninth paragraph of the first count of the petition are denied.

10th. Answering the tenth paragraph of the first count of the petition, this defendant says that the iron plates on the ties on the outside of said rail had openings or holes for two spikes, and that there was a spike in only one of said openings, all of which was usual and customary, not only at that point, but at all other points along its line of railway, and is the usual and customary way for said plates to be spiked. Except as answered, the averments of said [fol. 23] tenth paragraph of the first count of the petition are denied.

11th. The averments of the eleventh paragraph of the first count of the petition are denied.

12th. The averments of the twelfth paragraph of the first count of the petition are denied.

13th. The averments of the thirteenth paragraph of the first count of the petition are denied.

14th. The averments of the fourteenth paragraph of the first count of the petition are denied.

15th. Answering the fifteenth paragraph of the first count of the petition, this defendant says that said engine was equipped with an experimental device known as "Wright's Little Watchman", which was attached to certain apparatus connected with said engine, and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train. It says that the same was in good condition on said engine at the time but apparently the proper conditions did not develop which would cause the tripping of said valve and the application of said brake. It says that the same is merely an experimental device which will not operate at all times when said truck wheels leave the track, but will operate only when conditions develop which will trip the same. It says further that said device is not in use on all railroads, and is not required to be used under the Safety Appliance Act of Congress, or any regulations made in pursuance thereof. It says further that it was no part of the duty of James M. Cox to inspect the same. Ex-

cept as answered, the averments of said fifteenth paragraph of the first count of the petition are denied.

16th. The averments of the sixteenth paragraph of the first count of the petition are denied.

17. The averments of the seventeenth paragraph of the first count of the petition are denied.

[fol. 24] 18th. For the want of sufficient information, it can neither admit nor deny the averments of the eighteenth paragraph of the first count of the petition, except it does deny that the earnings of the decedent averaged the sum of Three Hundred Twenty-five Dollars ($325.00) per month, and it denies that it is liable to the plaintiff for damages in the sum claimed, or in any other sum.

And having answered fully said first count of the petition, defendant prays to be hence discharged.

Griffith & Matthews, Maddox, Matthews & Owens,
Defendant's Attorneys.

And, for answer to said second count of the petition, this defendant says:

1st. For the want of sufficient information it can neither admit nor deny the averments of the first paragraph thereof.

2nd. It admits the averments of the second paragraph thereof.

3rd. It denies the averments of the third paragraph thereof.

4th. It admits the averments of the fourth paragraph thereof.

5th. Answering the fifth paragraph thereof, defendant says that on the date and at the place mentioned, the said James M. Cox was the engineer in charge of the locomotive pulling its passenger train No. 40 from Birmingham, Alabama to Atlanta, Georgia, and that when said engine reached the point approximately as stated the front trucks of the engine struck a rock which had been placed on top of one of the rails, being the outside rail on a curve, and the front trucks of the locomotive were derailed. It says that said rock was placed on said track by some miscreant without its knowledge or consent just a short while prior

[fol. 25] to the arrival of said train at said point. Except as answered, the averments of said fifth paragraph of the second count of the petition are denied.

6th. The averments of the sixth paragraph thereof are denied.

7th. The averments of the seventh paragraph thereof are denied.

8th. Answering the averments of the eighth paragraph thereof, this defendant says that the point where said rock was on said track was on a curve to the left, and that the engineer's duties placed him on the outside of the curve. It denies that said curve extended for anything like three hundred (300) yards. It assumes that the fireman was at some point on the left side of said engine in the performance of his duties. It admits that said engine was provided with an automatic stoker which fired the same by machinery, the valves of which were operated by the fireman. Except as answered, the averments of said eighth paragraph of the second count of the petition are denied.

9th. Answering the ninth paragraph of the second count of the petition, this defendant says that its investigation of the condition after the derailment of said engine showed that after the wheels of said truck under the front end of the engine left the rail it ran for a distance of approximately seven tenths (7/10) of a mile until it reached a switch going out to the right from the main line, at which point said engine was derailed and turned over. Apparently said front wheels of said truck were off the track from the time the same struck the rock as hereinbefore referred to, and apparently when said front wheels struck the switch they were thrown to one side, and derailed and turned over the engine. Except as answered, the averments of said paragraph can neither be admitted nor denied for the want of sufficient information.

[fol. 26] 10th. Answering the tenth paragraph of the second count of the petition, this defendant says that said engine was equipped with an experimental device known as "Wright's Little Watchman," which was attached to certain apparatus connected with said engine, and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and

thereby apply the air on the brakes of the train. It says that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause tripping of said valve and the application of said brake. It says that the same is merely an experimental device, which will not operate at all times when said truck wheels leave the track, but will operate only when conditions develop which will trip the same. It says further that said device is not in use on all railroads, and is not required to be used under the Safety Appliance Act of Congress, or any regulations made in pursuance thereof. It says further that it was not part of the duty of James M. Cox to inspect the same. Except as answered, the averments of said tenth paragraph of the second count of the petition are denied.

11th. The averments of the eleventh paragraph thereof are denied.

12th. The averments of the twelfth paragraph thereof are denied, except it admits that when said engine was derailed and overturned, the decedent, James M. Cox, was so injured that he died shortly thereafter.

13th. For the want of sufficient information, it can neither admit nor deny the averments of the thirteenth paragraph thereof, except it does deny that the earnings of the decedent averaged the sum of Three Hundred Twenty-five Dollars ($325.00) per month, and it denies that it is liable to the plaintiff for damages in the sum claimed or in any other sum.

[fol. 27] And having answered fully said second count of the petition, defendant prays to be hence discharged.

Griffith & Matthews, Maddox, Matthews & Owens,
Defendant's Attorneys.

[File endorsement omitted.]

IN SUPERIOR COURT OF HARALSON COUNTY

DEFENDANT'S ORIGINAL DEMURRER TO PLAINTIFF'S PETITION —Filed Aug. 16, 1933

Now comes Southern Railway Company, defendant in above stated case, and demurs to the first count of said petition, on the grounds:

1st. That the averments thereof are insufficient and fail to set forth any cause of action against this defendant.

2nd. That the averments thereof are insufficient to show any right of recovery for the use and benefit of the said Mrs. Olivia Cox Lunsford or the said Hubert A. Cox, there being no averment that they were minors or in any way dependent upon the said James M. Cox.

3rd. It demurs specially to the averments of the eighth paragraph of the first count of the petition on the ground that the same is vague, indefinite and uncertain, in that it fails to set forth, or to describe the defects and insufficiencies therein referred to, or to set forth how, or in what way there was any negligence on the part of this defendant as to its engine appliances, track or roadbed.

4th. It demurs specially to the averments of the ninth paragraph of the first count of the petition, to-wit: "The track did not have sufficient elevation on the right hand side going east to render it safe to propel an engine weigh-[fol. 28] ing in the neighborhood of two hundred tons, as did the engine in question, over said point"; and to the further allegation: "that for an engine of that weight the elevation of the track was insufficient on said outside or right hand side in the direction in which it was going," on the grounds:

(a) That the same are respectively mere conclusions of the pleader and set forth no issuable facts.

(b) That such averments are vague, indefinite and uncertain, in that they do not allege what elevation on the right hand side going east was necessary in order to render the track safe for an engine of the kind described, or what elevation of the track there was on that side, or how or in what way, or to what extent the elevation thereof was insufficient.

(c) That there are no averments in said paragraph, or elsewhere in said first count of the petition, showing or tending to show how, or in what way the alleged insufficient elevation of the outside rail proximately caused or contributed to the derailment of the trucks of said engine.

5th. It demurs specially to the several averments of the tenth paragraph of said first count of the petition, on the grounds:

(a) That the averment thereof to the effect that the rails and track were not firm and secure is a mere conclusion of the pleader and sets forth no issuable facts.

(b) That the averment thereof with respect to insufficient bracing is a mere conclusion of the pleader and sets forth no issuable facts.

(c) That the averment as to insufficiency of the spiking is a mere conclusion of the pleader and sets forth no issuable facts.

(d) That the averment as to the insecurity of the track is a mere conclusion of the pleader and sets forth no issuable facts.

[fol. 29] (e) That the averment that the matters therein referred to "allowed the said rails to yield to the pressure of a heavy train at said point, which caused a certain amount of looseness and vibration in the rail and caused the same to give at the top and to have a tendency to give and thus enable the flange of a wheel to ride over the rail at said point", sets forth mere conclusions of the pleader, without any issuable facts in support thereof; that the same are vague, indefinite and uncertain, in that it is not alleged to what extent said track would yield to the pressure of the train, how much looseness or vibration in the rail was caused to what extent the rails were caused to give at the top, or how, or in what way these several matters would enable the flange of a wheel to ride over the top of the rail.

(f) That there are no averments in said paragraph, or elsewhere in the first count of the petition, showing that the matters and things therein referred to proximately caused the derailment of the front trucks of said engine, or why, if the same did cause the derailment of the front trucks, it did not also cause the derailment of the other wheels and drivers of the engine at that point.

6th. It demurs specially to the averments of the eleventh paragraph of the first count of the petition, on the grounds:

(a) That the averment to the effect that the cross ties were out of condition is a mere conclusion of the pleader and sets forth no issuable fact, and is vague, indefinite and

uncertain as to how or in what respect the same were out of condition.

(b) That the averments to the effect that the rotten condition of said ties allowed said spikes to have play and room and the same were not tight, and allowed the rail to vibrate and cause the top thereof to give and to allow the [fol. 30] the flange of a wheel to climb over the same, set forth a mere series of conclusions, unsupported by any specific averments of fact, particularly as to how there was any proximate connection between the several results therein averred; that the same are vague, indefinite and uncertain in that it is not alleged to what extent the spikes had play and room and were not tight, or how or in what way the fact that the spikes were not tight caused or tended to cause the top of the rail to give and allow the flange of a wheel to climb over the same.

7th. It demurs specially to the averments of the twelfth paragraph of the first count of the petition, on the grounds:

(a) That the averment that said spikes had worked up to a point above the flange of the rail and did not come in close and tight contact with the same so as to make the same secure, is a mere conclusion of the pleader, and is vague, indefinite and uncertain in that it is not alleged to what extent the spikes had worked up.

(b) That the averment that there was a space between the head of the spikes and the bottom flange of the rail which allowed play and vibration and looseness and insecurity in said rail, and which had a tendency to and did cause said front trucks to mount the outside of said rail and ride over the same, is a mere series of conclusions of the pleader, unsupported by any specific averment of fact; that the same is vague, indefinite and uncertain in that there is no averment as to the extent of the space between the head of the spikes and the bottom flange of the rail, to what extent this allowed play and vibration and looseness and insecurity in the rail, or how or in what way this had a tendency to and caused the said front trucks to mount the outside of said rail and ride over the same; or how, or in what way, if there was such a tendency and such mat- [fol. 31] ters did cause the front trucks to mount the outside of said rail and ride over the same, it did not also

cause the drivers and other wheels of the engine to mount and ride over the same.

8th. It demurs specially to the averments of the thirteenth paragraph of the first count of the petition, on the grounds:

(a) That the averment as to the insufficiency of the out or bearing rail is a mere conclusion of the pleader and sets forth no issuable facts.

(b) That it is not alleged in said paragraph, or elsewhere in the first count of the petition, how or in what way the insufficiency of said rail, as therein referred to, caused said trucks to mount the rail and the right hand wheel thereof to go off on the outside, there being no averments showing how or in what way the matters and things referred to proximately caused or tended to cause said trucks to mount said rail.

9th. It demurs specially to the averments of the fourteenth paragraph of the first count of the petition, on the grounds:

(a) That the several clauses thereof respectively are mere conclusions of the pleader, and set forth no issuable facts.

(b) That there are no averments showing how, or in what way the front wheels of said engine were out of condition, and such an averment is vague, indefinite and uncertain for such reasons.

(c) That there are no averments showing or tending to show how, or in what respect the shop authorities of the defendant were negligent in allowing the same to go in service on said date, and the same is a mere conclusion and is vague, indefinite and uncertain in the respects stated.

[fol. 32] (d) That there are no averments showing or tending to show how or in what way the fact that the front wheels of the engine were sharp and/or out of condition proximately caused or tended to cause said truck wheels to mount and ride over the rail.

10th. It demurs specially to the averments of the fifteenth paragraph of the fifth count of the petition, on the grounds:

(a) That the averments thereof with respect to the watchman and the description thereof, and the manner in which it is claimed it would operate, *or* insufficient, vague, and indefinite, and fail to put this defendant upon notice of how or in what way it was claimed there was any negligence with respect thereto.

(b) That there are no averments showing or tending to show that said watchman was an appliance or safeguard required under the Federal Safety Appliance Act of Congress, nor is there any averment showing or tending to show that the same was in customary and general use on first class railroads, nor is there any averment showing or tending to show that the same would, in all cases, operate or function when the front truck wheels of an engine left the track.

(c) That the failure of said watchman to function was not the proximate cause of the death of the decedent or proximately connected therewith, especially in view of the averments of said paragraph and the remainder of said first count of the petition.

(d) That there are no averments showing or tending to show any duty on the part of the defendant to have or use said watchman on its engine or to keep the same in repair; and in the absence thereof, the condition thereof, and its failure to operate are wholly immaterial and irrelevant, and are not negligence on the part of this defendant.

11th. It demurs specially to the averments of the sixteenth [fol. 33] paragraph of the first count of the petition, on the grounds:

(a) That the averments that the cross ties were not securely ballasted and the rail was not secure, are mere conclusions of the pleader, and set forth no issuable facts, and are vague, indefinite and uncertain, in that it is not alleged how, or in what respect the cross ties were not securely ballasted and the rails were not secure.

(b) That the same is vague, indefinite and uncertain in that it is not alleged how, or in what way the matters therein referred to proximately contributed to the final derailment of said engine.

(c) That the same is contradictory to the averments of the sixth paragraph of the first count of the petition, to the effect that the derailment of the engine was caused by the trucks striking the switch, the effect of which was to throw the trucks and wheels to one side and under the engine and obstruct its progress and to cause it to leave the rail and become unbalanced and turn over.

12th. It demurs specially to the averments of the seventeenth paragraph of the petition, on the grounds:

(a) That the same is a mere conclusion of the pleader and sets forth no issuable facts.

(b) That the same is vague, indefinite and uncertain, in that it is not alleged how, or in what respect this defendant was guilty of any negligent acts and omissions, or how, or in what way there was any defective and insufficient conditions of its engines, appliances, machinery, track and roadbed.

Wherefore, the premises considered, defendant prays that its said demurrers be inquired into by the court, that the same be sustained and said first count of the petition dismissed.

Griffith & Matthews, Maddox, Matthews & Owens, Defendant's Attorneys.

[fol. 34] And, for demurrer to the second count of the petition, defendant says:

1st. That the averments thereof are insufficient to set forth any cause of action against this defendant, or to show any actionable negligence on the part of this defendant.

2nd. That the averments thereof are insufficient to show any right of recovery for the use and benefit of said Mrs. Olivia Cox Lunsford or Hubert A. Cox, it not being alleged that they were minors or in any way dependent upon the said James M. Cox.

3rd. It demurs specially to the averment of the fifth paragraph of said count of the petition, to the effect that the engine struck a rock or other object, negligently allowed by the defendant to be on said track and adjacent to the rails thereof, etc., on the grounds:

(a) That the same is a mere conclusion of the pleader, especially in so far as it undertakes to charge negligence against this defendant.

(b) That the same is vague, indefinite and uncertain in that it is not alleged how, or in what respect this defendant was negligent.

(c) That the same is vague, indefinite, uncertain and insufficient, in that there is no averment showing or tending to show that this defendant or any of its employees placed said rock or other object on the track, or had any knowledge or notice that it was on the track.

(d) That the same is vague, indefinite and uncertain, in that it is not alleged what employee or employees of this defendant allowed said rock or other object to remain on the track, or had any knowledge or notice that it was on the track.

4th. It demurs specially to the averments of the sixth paragraph of the second count of the petition, on the grounds:

[fol. 35] (a) That the same is a mere conclusion of the pleader, especially in so far as it undertakes to charge negligence against this defendant.

(b) That the same is vague, indefinite and uncertain in that it is not alleged how, or in what respect this defendant was negligent.

(c) That the same is vague, indefinite, uncertain and insufficient, in that there is no averment showing or tending to show that this defendant or any of its employees placed said rock or other obstruction on the track, or had any knowledge or notice that it was on the track.

(d) That the same is vague, indefinite and uncertain, in that it is not alleged what employee or employees of this defendant allowed said rock or other obstruction to remain on the track, or had any knowledge or notice that it was on the track.

5th. It demurs specially to the averments of the seventh paragraph thereof, on the grounds:

(a) That the averments thereof, to the effect that defendant's section hands and section foreman were negligent in failing to properly inspect said track at said point, is a mere conclusion of the pleader and fails to set forth how, or in what respect they were negligent.

(b) That the averments thereof to the effect that said curve was dangerous is a mere conclusion of the pleader, and is vague, indefinite and uncertain, in that there are no averments as to how, or in what respect it was dangerous.

(c) That said paragraph as a whole is vague, indefinite and uncertain, in that it fails to set forth what would be a proper inspection of the track, and how, or in what respect it was not properly inspected.

6th. It demurs specially to the averments of the eighth paragraph thereof, on the grounds:

[fol. 36] (a) That the same are wholly insufficient to show any actionable negligence on the part of the fireman.

(b) That there are no averments showing or tending to show that said fireman discovered or had any knowledge that said rock was on the track.

7th. It demurs specially to and moves to strike the tenth paragraph thereof, on the grounds:

(a) That the averments thereof with respect to the watchman and the description thereof, and the manner in which it is claimed it would operate, are insufficient, vague, and indefinite, and fail to put this defendant upon notice of how or in what way it was claimed there was any negligence with respect thereto.

(b) That there are no averments showing or tending to show that said watchman was an appliance or safeguard required under the Federal Safety Appliance Act of Congress, nor is there any averment showing or tending to show that the same was in customary and general use on first class rail roads, nor is there any averment showing or tending to show that the same would, in all cases, operate or function when the front truck wheels of an engine left the track.

(c) That the failure of said watchman to function was not the proximate cause of the death of the decedent or proximately connected therewith, especially in view of the averments of said paragraph and the remainder of said second count of the petition.

(d) That there are no averments showing or tending to show any duty on the part of the defendant to have or use said watchman on its engine or to keep the same in repair; and in the absence thereof, the condition thereof, and its failure to operate are wholly immaterial and irrelevant, and are not negligence on the part of this defendant.

[fol. 37] 8th. It demurs specially to and moves to strike the averments of the eleventh paragraph thereof, on the grounds:

(a) That the averments that the cross ties were not securely ballasted and the rail was not secure, are mere conclusions of the pleader, and set forth no issuable facts, and are vague, indefinite and uncertain, in that it is not alleged how, or in what respect the cross ties were not securely ballasted and the rails were not secure.

(b) That the same is vague, indefinite and uncertain, in that it is not alleged how, or in what way the matters therein referred to proximately contributed to the final derailment of said engine.

9th. It demurs specially to the averments of the twelfth paragraph of the petition, on the grounds:

(a) That the same is a mere conclusion of the pleader and sets forth no issuable facts.

(b) That the same is vague, indefinite and uncertain, in that it is not alleged how, or in what respect this defendant was guilty of any negligent acts and omissions, or how, or in what way there was any defective and insufficient conditions of its engine, appliances, machinery, track and roadbed.

Wherefore, the premises considered, defendant prays that these its grounds of demurrer to the second count of the petition be sustained and that the same be stricken.

Griffith & Matthews, Maddox, Matthews & Owens,
Defendant's Attorneys.

[File endorsement omitted.]

[fol. 38] In Superior Court of Haralson County

First Amendment to Plaintiff's Petition

Plff. amends paragraph 8 of 1st count of the petition by adding the words: "as hereinafter stated".
This Nov. 18, 1933.
Arnold, Gambrell & Arnold, Plff's. Attys.

The foregoing amendment by plaintiff is hereby allowed. Nov. 18, 1933.

J. R. Hutcheson, Judge S. C. Tal. Co.

In Superior Court of Haralson County

Order on Defendant's Demurrer—Filed Nov. 18, 1933

After hearing the argument the within and foregoing demurrer is hereby overruled as to each and every ground therein contained.
This Nov. 18, 1933.

J. R. Hutcheson, Judge S. C. Tal. Co.

[File endorsement omitted.]

In Superior Court of Haralson County

Bill of Exceptions Pendente Lite Filed by Defendant on the 14th Day of December, 1933 and Order

State of Georgia,
Haralson County:

Be it remembered, that on the 12th day of April, 1933, Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James Monroe Cox, filed her suit against the Southern Railway Company in the Superior Court of Haralson County, Georgia, said suit being numbered 2229 and made returnable to the July Term, 1933, of said Court; said suit [fol. 39] being a suit brought in two counts for the sum of Fifty Thousand Dollars ($50,000.00) on account of the death of James Monroe Cox, alleged to have been caused by the

negligence of the defendant; that thereafter, within the time provided by law, and on August 16th, 1933, the defendant filed its answer and demurrer to the petition filed in said case; all as shown by the record in said case; that thereafter, on November 18th, 1933, plaintiff amended said petition, which amendment was allowed on November 18, 1933; that thereafter said petition as amended and the demurrer thereto came on to be heard before the Superior Court of said county, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, said order being in words and figures as follows, to-wit:

"After hearing the argument the within and foregoing demurrer is hereby overruled as to each and every ground therein contained.

This Nov. 18, 1933.

J. R. Hutcheson, Judge S. C. Tal. C."

To this ruling and judgment of court overruling its demurrer, the defendant, Southern Railway Company, then and there excepted and now excepts and assigns error thereon, and says that the court erred in overruling said demurrer on each and all of the grounds therein contained.

And now, within the time provided by law, and within thirty days of the date of the order overruling said demurrer, comes defendant, Southern Railway Company, and tenders this its bill of exceptions pendente lite and prays that the same may be certified in accordance with law, and made a part of the record in said case.

This the 8th day of December, 1933.

Walter Matthews, E. S. Griffith, Maddox, Matthews & Owens, Attorneys for Defendant, Southern Railway Company.

[fol. 40] I hereby certify that the above and foregoing bill of exceptions pendente lite are true. Let the same be filed as a part of the record in said case.

This the 9th day of December, 1933.

J. R. Hutcheson, J. S. C. T. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF HARALSON COUNTY

SECOND AMENDMENT TO PLAINTIFF'S PETITION—Filed Jan. 15, 1934

Amending the first count in the petition in the case above stated, the plaintiff alleges the following as a distinct and separate paragraph:

That the safety chains attached to the front end of the truck on the engine which became derailed in this case were too short by from eight to fifteen inches, and did not have sufficient play to meet the exigencies of the swaying movements of the engine around curves and other portions of the track, and said short safety chains operated to pull up the truck at the curve where the same was first derailed so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails, and plaintiff alleges that the said chains were a part of said locomotive and were an appurtenance thereof and were not in proper condition and safe to operate in the service to which the same were put, without unnecessary peril to life or limb, and that the same did not function properly.

Plaintiff also alleges that the defendant and its agents and servants placed said chains upon said engine, knew thereof, and were negligent in so constructing and placing the same as herein described, but plaintiff alleges this negligence as a cumulative and an additional fact and alleges that said chains being a part and appurtenance of the [fol. 41] boiler, the defendant is responsible for injuries proximately resulting from said condition, which was not a proper condition and which rendered the said chains not safe to operate in the service to which they were put.

This allegation is made in connection with all of the other allegations in said first count, all of which are still insisted on.

Amending the second count in said petition, the plaintiff alleges the following as a distinct and separate paragraph:

That the safety chains attached to the front end of the truck on the engine which became derailed in this case were too short by from eight to fifteen inches, and did not have sufficient play to meet the exigencies of the swaying movements of the engine around curves and other portions of the track, and said short safety chains operated to pull up

the truck at the curve where the same was first derailed so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails, and plaintiff alleges that the said chains were a part of said locomotive and were an appurtenance thereof and were not in proper condition and safe to operate in the service to which the same were put, without unnecessary peril to life or limb, and that the same did not function properly.

Plaintiff also alleges that the defendant and its agents and servants placed said chains upon said engine, knew thereof, and were negligent in so constructing and placing the same as herein described, but plaintiff alleges this negligence as a cumulative and an additional fact and alleges that said chains being a part and appurtenanec of the boiler, the defendant is responsible for injuries proximately resulting from said condition, which was not a proper condition and which rendered the said chains not safe to operate in the service to which they were put.

[fol. 42] This allegation is made in connection with all of the other allegations in said second count, all of which are still insisted on.

Arnold, Gambrell & Arnold, Plaintiff's Attorneys.

The foregoing amendment is hereby allowed and ordered filed and served, subject to the defendant's right to object or demur thereto.

This December 14, 1933.

J. R. Hutcheson, Judge, Superior Courts, Tallapoosa Circuit.

Service of the foregoing amendment and order, by copy, acknowledged.

This December 15th, 1933.

Maddox, Matthews & Owens, Attorney- for Defendant.

[File endorsement omitted.]

IN SUPERIOR COURT OF HARALSON COUNTY

DEFENDANT'S DEMURRER TO SECOND AMENDMENT TO PLAINTIFF'S PETITION—Filed Dec. 30, 1933

Now comes Southern Railway Company, defendant in above stated cause, and demurs to the amendment to the

petition allowed by the Court on December 14, 1933, and, for grounds thereof, says:

1st. It demurs to the averments of said amendment to the first count of said petition, on the grounds:

(a) That said averments, and each and every clause thereof separately, are mere conclusions of the pleader and set forth no issuable facts.

[fol. 43] (b) That the averment to the effect that the safety chains therein referred to "were too short by from eight to fifteen inches" is a mere conclusion of the pleader and sets forth no issuable facts, and is indefinite, uncertain and evasive in that it is not alleged what the length of said chains were, nor is it alleged what the length of such chains should have been.

(c) That the averment to the effect that said safety chains did not have sufficient play to meet the exigencies of the swaying movements of the engine curves and other portions of the track is a mere conclusion of the pleader and sets forth no issuable fact, and is indefinite and evasive, in that it fails to set forth how much play the same had and how much they should have had.

(d) It demurs specially to the averments to the effect that said short chains operated to pull up the truck at the curve where the same was first derailed so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails is a mere conclusion of the pleader and sets forth no issuable facts, and is indefinite, uncertain and evasive in that it fails to set out how or in what way said safety chains had the effect as therein claimed.

(e) It demurs specially to the averments to the effect that this defendant, its agents and servants were negligent in so constructing and placing the chains upon said engine as described in said amendment, on the grounds that the same are mere conclusions of the pleader and set forth no issuable facts, and is indefinite, uncertain and evasive in that there are no averments showing or tending to show how or in what way the constructing and placing of said chains as described was negligence on the part of this defendant or any of its employees, or how or in what way the same proximately caused or contributed to causing the derail-
[fol. 44] ment of said engine.

(f) That the averments to the effect that the condition of said chains "was not a proper condition and which rendered the chains not safe to operate in the service to which they were put" are mere conclusions of the pleader and set forth no issuable facts, and are vague, indefinite, uncertain and evasive in that it is not alleged how or in what way they were not in a proper condition, or how or in what way the condition referred to rendered said chains not safe to operate in the service to which they were put.

(g) That there are no averments showing or tending to show that said chains were required as a part of said locomotive or its equipment under the Safety Appliance Act or the Boiler Inspection Act of Congress, or any of the regulations or orders of the Interstate Commerce Commission adopted in pursuance of either of said Acts; and there are no averments showing or tending to show that the length of said chains as used on said engine was in any way a violation of any of said requirements under said Acts of Congress and the rules and regulations and orders of the Interstate Commerce Commission, made in pursuance thereof.

2nd. It demurs to the averments of said amendment to the second count of said petition, on the grounds:

(a) That said averments, and each and every clause thereof separately, are mere conclusions of the pleader and set forth no issuable facts.

(b) That the averment to the effect that the safety chains therein referred to "were too short by from eight to fifteen inches" is a mere conclusion of the pleader and sets forth no issuable facts, and is indefinite, uncertain and evasive in that it is not alleged what the length of said chains were, nor is it alleged what the length of such chains should have been.

[fol. 45] (c) That the averment to the effect that said safety chains did not have sufficient play to meet the exigencies of the swaying movements of the engine around curves and other portions of the track is a mere conclusion of the pleader and sets forth no issuable fact, and is indefinite and evasive, in that it fails to set forth how much play the same had and how much they should have had.

(d) It demurs specially to the averments to the effect that said short chains operated to pull up the truck at the curve where the same was first derailed so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails is a mere conclusion of the pleader and sets forth no issuable facts, and is indefinite, uncertain and evasive in that it fails to set out how or in what way said safety chains had the effect as therein claimed.

(e) It demurs specially to the averments to the effect that this defendant, its agents and servants were negligent in so constructing and placing the chains upon said engine as described in said amendment, on the grounds that the same are mere conclusions of the pleader and set forth no issuable facts, and is indefinite, uncertain and evasive in that there are no averments showing or tending to show how or in what way the constructing and placing of said chains as described was negligence on the part of this defendant or any of its employees, or how or in what way the same proximately caused or contributed to causing the derailment of said engine.

(f) That the averments to the effect that the condition of said chains "was not a proper condition and which rendered the chains not safe to operate in the service to which they were put" are mere conclusions of the pleader and set forth no issuable facts, and are vague, indefinite, uncertain and evasive in that it is not alleged how or in what way they were not in a proper condition, or how or in what way [fol. 46] the condition referred to rendered said chains not safe to operate in the service to which they were put.

(g) That there are no averments showing or tending to show that said chains were required as a part of said locomotive or its equipment under the Safety Appliance Act or the Boiler Inspection Act of Congress, or any of the regulations or orders of the Interstate Commerce Commission adopted in pursuance of either of said Acts; and there are no averments showing or tending to show that the length of said chains as used on said engine was in any way a violation of any of said requirements under said Acts of Congress and the rules and regulations and orders of the Interstate Commerce Commission, made in pursuance thereof.

(h) That the averments of said amendment are vague, indefinite, uncertain and evasive in that said averments are wholly insufficient to show how or in what way the shortness of said chains proximately caused or contributed to causing the derailment of said trucks, all averments with reference thereto being mere conclusions, without any definite statement of fact.

Wherefore, the premises considered, defendant prays that these its grounds of demurrer be inquired into by the Court, that the same be sustained and said petition dismissed.

Griffith & Matthews, Maddox, Matthews & Owens,
Defendant's Attorneys.

[File endorsement omitted.]

[fol. 47] In Superior Court of Haralson County

Order on Defendant's Demurrer to Plaintiff's Second Amendment to the Petition—Filed Jan. 15, 1934

After hearing argument the within demurrer is overruled.

This 15th day of January, 1934.

J. R. Hutcheson, Judge, S. C. T. C.

[File endorsement omitted.]

In Superior Court of Haralson County

Bill of Exceptions Pendente Lite—Filed by Defendant on the 22nd Day of January, 1934

State of Georgia,
Haralson County:

Be it remembered, that on the 12th day of April, 1933, Mrs. Olivia Cox Lunsford, administratrix of the estate of James Monroe Cox, filed her suit against the Southern Railway Company in the Superior Court of Haralson County, Georgia, said suit being numbered 2229 and made returnable to the July Term, 1933, of said Court; said suit being

a suit brought in two counts for the sum of Fifty Thousand Dollars ($50,000.00) on account of the death of James Monroe Cox, alleged to have been caused by the negligence of the defendant; that thereafter, within the time provided by law, and on August 16, 1933, the defendant filed its answer and demurrer to the petition filed in said case; as shown by the record in said case; that thereafter, on November 18, 1933, plaintiff amended said petition, which amendment was allowed on November 18, 1933, and thereafter said petition as amended and the demurrer thereto came on to be heard before the Superior Court of said County, the Honorable J. R. Hutcheson, Judge of said Court, then and there [fol. 48] presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, to which ruling defendant filed its exceptions pendente lite.

Be it further remembered, that thereafter, on December 14, 1933, plaintiff amended her petition by an amendment allowed subject to demurrer on said 14th day of December, 1933, and filed on January 15, 1934; to said amendment so filed the defendant, Southern Railway Company, filed its demurrer on January 15, 1934, which demurrer to the amendment came on to be heard before the Superior Court of Haralson County, Georgia, the Honorable J. R. Hutcheson, Judge of said Court, then and there presiding, and, after argument of counsel, the Court passed its order overruling said demurrer, said order being in words and figures as follows, to-wit:

"After hearing argument the within demurrer is overruled, this 15th day of January 1934.

J. R. Hutcheson, Judge S. C. T. C."

To this ruling and judgment of the court overruling its demurrer to said amendment to the petition, the defendant, Southern Railway Company, then and there excepted and now excepts and assigns error thereon, and says that the Court erred in overruling said demurrer on each and all of the grounds therein contained.

And now, within the time provided by law, and within thirty days of the date of the order overruling said demurrer, comes defendant, Southern Railway Company, and tenders this its bill of exceptions pendente lite and prays

that the same may be certified in accordance with law, and made a part of the record in said case.

This the 22 day of January, 1934.

Walter Matthews, E. S. Griffith, Maddox, Matthews & Owens, Attorneys for Defendant, Southern Railway Company.

[fol. 49] I hereby certify that the above and foregoing bill of exceptions pendente lite are true. Let the same be filed as a part of the record in said case.

This the 22 day of January, 1934.

J. R. Hutcheson, J. S. C. T. C.

[File endorsement omitted.]

In Superior Court of Haralson County

Verdict of the Jury

We, the jury, find for the plaintiff in the sum of Five Thousand ($5,000) Dollars.

This January 16th, 1934.

J. W. Hildebrand, Foreman.

In Superior Court of Haralson County

Judgment of the Court

Whereupon it is considered, ordered and adjudged that the plaintiff have and recover of the defendant the sum of $5,000.00 with $—— costs. Jan'y 16th, 1934.

J. R. Hutcheson, J. S. C. T. Co.

[fol. 50] In Superior Court of Haralson County

Motion for New Trial and Order Thereon—Filed Jan. 22, 1934

[Title omitted]

Verdict and judgment for plaintiff in above stated case at January, 1934, Term of Superior Court of Haralson County, on January 16th, 1934, for $5,000.00.

The defendant in the above stated case being dissatisfied with the verdict and judgment in said case as aforesaid, comes during said term of Court and before the adjournment thereof, and within thirty days from the date of said trial and the verdict and judgment therein, and moves the Court for a new trial, upon the following grounds, to wit:

First. That the said verdict is contrary to law and the principles of equity and justice.

Second. That the said verdict is contrary to the evidence in said case and without evidence to support it.

Third. That the said verdict is decidedly and strongly against the weight of the evidence.

Whereupon, movant prays that these grounds for new trial be inquired of by the Court, and that a new trial be granted movant in said case.

Walter Matthews, E. S. Griffith, Maddox, Matthews & Owens, Attorneys for Movant.

Read and considered and ordered filed. It is ordered that the plaintiff in said case show cause before me at the Court House in Buchanan, Georgia, at such time as motions are heard for this term of court, — M., on the — day of ——, 1934, why the foregoing motion should not be sustained and a new trial granted in said case.

[fol. 51] It appearing that it is impossible to make out and complete a brief of the evidence in said case within the time usually allowed by law, it is ordered that Movant have until the final hearing of said motion, whenever that may be, to prepare and present for approval a brief of the evidence in said case, and the Judge may enter his approval thereon and the same may be filed in the Clerk's office, either in term time or vacation, at any time up to the date of the final hearing of said motion for new trial, or within ten days thereafter. If, for any reason, said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place, in term time or vacation, as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding Judge may fix on the application of either party, of which time and place the opposite party shall have at least five days notice in

writing. If, for any reason, this motion is not heard and determined before the beginning of the next term of said Court, then the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that the Plaintiff be served with a copy of this motion and order, unless service be acknowledged; and that this order act as a supersedeas until the further order of this Court.

This the 22 day of January, 1934.

J. R. Hutcheson, Judge of Superior Court of Haralson County.

[fol. 52] Due and legal service of the within motion and order acknowledged, time, copy, and all other further service waived.

This the 22nd day of January, 1934.

Arnold, Gambrell & Arnold, Price Edwards, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 53] In Superior Court of Haralson County

Brief of the Evidence—Filed April 5, 1934

Edgar Orr, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

My name is Edward H. Orr. I live in Atlanta. I am a commercial photographer, and have been in that business 13 years. On the 14th day of April, 1933, I took some pictures of the Southern Railway track in this county near Bremen, to the west of Bremen. I recall a colored church about a mile and a third west of Bremen. I recall photographing a number of ties. I am referred to picture No. 1, taken at a point ten rails west of a point which was pointed out to me, a point was pointed out to me opposite that colored church and graveyard as being the point where this train No. 40 was first derailed. That picture No. 1, with reference to that point where the train was first derailed, opposite that negro church down there, was taken a

short distance west of the point of derailment. The rails were counted at the time. This memorandum is correct; it was ten rail lengths west of the point of derailment, toward—— That first, No. 1 was looking east on the track, and was a correct photograph of the track as it appeared. Picture No. 2 takes in the church; this picture includes the church. It was taken about 14 rail lengths west of the point pointed out to me as the point of derailment. When I was there a gentleman by the name of Mr. Lunsford was there, a son-in-law of the deceased engineer, Mr. Cox. He pointed out the point of derailment. This No. 3 is another photograph I took in that vicinity. No. 2 is a correct photograph. Picture No. 3 was taken about 15 feet west of the point of derailment, looking toward the point of derailment, and is a correct representation of the track. Picture No. 4 was taken from the point of derailment of the engine, looking [fol. 54] toward the rail and ties. Mr. Lunsford was seen in No. 3; he is not in this one. All the pictures are correct representations of the track. Picture No. 5 was taken from a point about 20 feet east of the point of derailment, looking west; that looks west, toward Birmingham, and was taken on the Bremen side of it. That gentleman is pointing at a depression—a mark on the tie, apparently made by the flange of a wheel. In No. 3 he was pointing at the point of derailment, showing the point of derailment. No. 5 is a correct representation. No. 6 was taken from a point about 30 feet east of the point of derailment, looking east, toward Bremen. It shows the curve of the track toward Bremen. It is a correct representation. In picture No. 7 I moved up about seven-tenths of a mile to where there was a switch to the right; this picture was made at a point near the Bremen station, about 30 feet west of the right switch. That's close to three-quarters of a mile from where I took the first picture. No. 7 is a correct representation. Picture No. 8 was taken from a point about 30 feet west of the right switch and about ten feet south of the south rail, looking north. It is a correct representation. No. 9 is taken from the same place as No. 8, anl looking north from the south of the track, looking north; it shows the condition of the rails and the spikes as appeared at that time. It is a correct representation. Last week I went to the Southern Railway Company's roundhouse in Atlanta and took a picture on the front of some engines of a contrivance known as Wright's

Little Watchman. I took those pictures on Tuesday, January 9th. I went to the roundhouse at North Avenue, and the foreman allowed me to take these pictures. No. 1 is a close-up view of this contrivance, including the part that is on the engine truck and including the part that is attached to the frame of the engine; that is a view of the Little Watchman device, and is a correct picture. Picture No. 2 [fol. 55] is a correct picture of the front of the engine from a similar viewpoint. No. 1407 is the number of the engine in question. The first one is of the same engine. Picture No. 3 is taken from the left side of one of those green engines, No. 1407, the same one. It is a correct picture of the front of the engine showing the apparatus shown in previous pictures, all of the same engine. No. 4 here is a correct picture of the front part of engine No. 1263, all of the Southern Railway, showing the Little Watchman and attachments.

Cross-examination:

These photographs of the condition at Bremen were taken on April 10th. I went there at the instance of Mr. Arnold, at his request. My place of business is in Atlanta. This photograph No. 9 is taken up east of the right hand switch and near the station at Bremen, just slightly east of the right-hand switch, and something like three-quarters of a mile from the point of the original derailment as I understood it, or from the little church. I of course don't know where it derailed myself, and don't know the details of the accident. All I know in regard to those things is what somebody told me.

Redirect examination:

In No. 8 I was standing south of the track. The station of Bremen is to the right. This last picture, No. 9, was taken from substantially the same place, slightly south of the track. We made a memorandum at the time of the exact position of each one. This is the memorandum I made at the time. There is some doubt as to whether picture No. 9 was slightly east or slightly west of the location of No. 8. It was near the same point.

[fol. 56] W. A. GOREE, called as a witness in behalf of the plaintiff, first being duly sworn, testified by deposition as follows:

Direct examination:

I live at 3710 Avenue D, South, in Birmingham. On the 14th day of February, 1933, I was in the employment of the Southern Railway Company. I was both an engineer and fireman. On the 14th day of February, 1933, I went out of Birmingham towards Atlanta on train No. 40, which was a passenger train, and I was firing that engine. Mr. J. M. Cox was the engineer of that engine. I think we had seven coaches, either seven or eight. I am acquainted with a darky church just before you get into Bremen, I know where it is. I have passed by it often. There is a curve in the track as you approach that church, a curve for about a quarter of a mile. I don't remember the place where this front truck first got off the track. If it was just about in front of that church, I know where that is. As I approached that church there was a long curve to the left, that went around that way. As to what I was doing as I approached that church, I will give the whole details: As we topped the hill from Waco, I went back to clean up the tank and get ready to pull out a slide to the stoker when we got to Bremen. That engine had a stoker; you didn't have to shovel the coal in with your hands, but opened a valve, and that operated automatically to put the coal in the engine just as I wanted it. I went back to sort of clean up my stoker so I could operate it; if coal gets in the little groove, you have to sweep it out, and get it so it will pull out the groove; the slide fits in like that. Before that I had been sitting on my seat there. I always look forward. I did not see anything on the track, any rocks or anything of that sort, or any objects at all that attracted my attention, on the track. The track comes up from Waco—let me draw you a diagram of it—coming from Waco and approaching that church [fol. 57] and where I understand it was derailed; that is where the curve is; this is Waco; this would be the switch at the bridge; of course it ought to be right here to be there by the bridge; then we come around. There is the negro church right around there. We have got a signal coming east right here, then we have got one coming west

right here, just as we top the hill; we came on up; this is a little bit too abrupt, it ought not to be quite that much, it ought to be like that, as we came on up about along here. When we topped the hill is where I went back to clean up the tank. On this drawing marked Exhibit 11, about the time I got to where that cross mark is on this rough drawing here, I went back to the tank. As I was passing this colored church here, I did not notice anything. I was on the tank. After I got past that church I did not hear any noise or anything of that sort; I didn't notice it, the engine was running. The engine appeared to be running just as it ordinarily did. I am shown a sort of detailed drawing, marked No. 10, with a place here marked "Church," and so on, and up here is a track that goes out to the left, and a little further on going east is another track that turns out to the left, and a little further on is a track that turns out to the right. As I got to this first track that turns out to the left I noticed a noise. It sounded as though we had run over something; it was bad; I thought we were derailed. The engine went on; just as soon as we crossed that switch, it straightened up, and I didn't hear anything. I didn't know whether it was all right or not; I didn't hear anything any more. I heard a noise when I was on the switch, and when I passed over the switch the noise stopped, and the engine continued to run along on the track like it was all right. I think it is about twelve car lengths from that first switch to the left to that second switch. When I passed that first switch to the left I was doing my usual work, firing; using the valve. [fol. 58] I sat up on my seat and was looking ahead. I didn't know we were off the track. The engineer was sitting on his seat box. It isn't essential that you hold the throttle all the time, they are held by notches; but he was at his regular place. After we passed that first switch to the left, about twelve car lengths, there is another switch to the left. I heard a noise when I struck that next switch to the left. It might have sounded greater than the first noise I heard because we were right on the other one no quicker than we got off of that one. When I got to the second switch to the left, I heard another noise. It wasn't over two or three seconds after that before we began to get derailed. The next switch was two car lengths, and when we struck that one to the right, two car lengths away, we just took down the passing track; the engine

got off the rails. I saw that. Mr. Payne says it run off the rails 184 feet, as well as I remember, when he came there. It was bumping along there 184 feet, and then it turned over on its right side. I couldn't say exactly whether the engineer put on his brakes right about the time that second noise was heard or not; he put them on right at the time, either before or when we headed in, that is as soon as we struck the third one. As soon as we struck the third one, I know he put them on; I just merely heard him; you know you can hear the exhaust from the brake. Speaking of that first noise I heard twelve car lengths back there at the first switch to the left, the engine doesn't often make noises going up places on the track like a chain rattling or something, not so much. Of course, there is the usual noise of the engine running. you know, but when you run over anything there is a different noise to what there is when the engine is just working on smooth rails. That first noise sounded like we had run over something, but she kept on going on the track, and I thought it was all right; I didn't know; I didn't have time; but that was [fol. 59] twelve car lengths away then I am speaking of. That twelve car lengths it ran all right apparently to me; wait a minute, anytime, all along when you are running at a high rate, you are running over a little trash or maybe just a little dirt, or this, that and the other that some truck maybe put on the track, and it creates a noise under the wheels, especially when you go fast, but if you don't go so fast you don't hear it. When you are going fast you often hear a noise from some little dirt or cinders or something on the track; and the train, however, goes on, if it isn't enough to lift it off by the flange. This train went on twelve car lengths after that first noise. I couldn't tell it was off the track. I didn't know it was off the track. When it struck that third one to the left, that made a big noise, and before I had any time hardly to think, it struck the one to the right. I didn't have time to do anything between that second noise and hitting the right-hand switch but hold, that is all, because in a second or two it was against that switch on the right; and then it got on the cross-ties and began to bump. I would say this gentleman was running this engine at least 40 or 45 miles an hour. That was the usual speed for that type of engine along there. I don't think there is anything unusual about that speed. I am both an engineer and a fireman. From the

time I passed that little negro church, if I had wanted to stop that train at that speed, I couldn't be exact, I could have stopped it within fifteen car lengths easy. The length of a car is 40 feet; I could have stopped it within fifteen car lengths, a car being 40 feet long, you could have easily enough stopped it in that time if you went in emergency. If you are approaching something bac, you know you must put it in emergency. In making a service application, you just have, in order to handle your train smoothly, you have to just be governed in the distance in which you have got to stop; but in saying I could stop in fifteen car lengths [fol. 60] of 40 feet to the car I meant an emergency application. I have stopped that train. I don't know just how far it is from that church down there to that final right hand switch—I never did measure it; we only know where the mile posts are and the switches; I never have been over there at all since then. Sometimes we run over dirt or sand or something that bumps and makes a noise; sometimes we have high water that just floats a little trash on the track, but ninety-nine times out of a hundred nothing happens on those occasions. I didn't know the front trucks were off of that engine from the time I passed the church. I don't remember hearing any noise that indicated the front trucks were off; I didn't hear a thing until we crossed that first switch to the left. We were going slightly upgrade. The gentleman was working steam. That exhaust makes a considerable noise. That would enable me to have stopped a little easier if I had applied the brakes going upgrade. After we hit this second switch to the left, I didn't have any time to react before hitting the right switch; it was too quick. That engine, when it left the rails, as to how it behaved, if you have ever ridden in a wagon over cotton rows where the mules were running, it was just about like it; we were dragging up the rails and cross-ties and everything, so you can just imagine how bad it was. I thought that that engine was equipped with Wright's Little Watchman. I couldn't say that I had examined that one, I have examined some. It wasn't my duty to examine it; but I thought this engine was equipped with it. I have been on an engine where that Little Watchman worked when the engine got off. That was turning in on Y's, and places like that where the curves are pretty stiff. When it works it opens the air to the atmosphere just like—opens the valve, putting the brakes in emergency

just like putting them on from the engine. I never was in a wreck before; not nothing but just getting off around [fol. 61] the switches, that is all; I have never had one to jump the track with me. When this engine got off the track and turned over, it broke all this pipe, and the steam just poured right back in on us. Mr. Cox got burned bad. It killed him. He was burned and scalded to death. Where this first switch turned to the left there is a road crossing there just west of that place; it is about twelve car lengths I guess from that switch. That road crossing is a place where dirt and so on is likely to get on the track from wagons coming across. That would make a noise; we have that frequently on crossings. A few times in my running I have seen that Little Watchman apply on the line of road. As to what would happen to make it apply, some unusual curve, you know, or maybe a swing of the engine that would be too great for it, and it would apply that way; it would put the brakes on immediately after the swing of the engine occurred. I don't know as I have ever had it to happen over two or three times. I was hurt so bad I couldn't look at the engine after the wreck. I was not unconscious. I have never been back there and seen that place where the trucks first got off, and seen the marks of it. I did not see any rock on the rail there, or anything. I have run over small rocks on the rails, cinders, or sand or sand rocks. I don't know as I have ever run over any sandstone rock as big as your fist. I have run over one as big as a hen's egg when we were working local. The engine crushes the rock. I don't think I have ever known of a rock throwing the engine off before in my experience. I couldn't estimate how many times I have ever run over stones or rocks or sandstone; I guess hundreds of times, because I have been here twenty-six years. When we want to stop an engine, we have a sand box on our engine. You apply sand if you want to; it isn't essential, but you can do it. That does not make the engine run off the track; it tends to stop it because of the friction. The difference be-[fol. 62] tween sand and sandstone rock is that this sand would be distributed along on the rail, and the sandstone rock would be in one pile. If I were running an engine along, and saw a small rock on the track, I would not stop for it. The engine usually crushes it, or just brushes it

off, and sometimes you don't ever know it. If a rock was a foot high the pilot would knock it off. I have heard of children putting things on the rail, kind of along on the track. I couldn't say that I have ever seen it or run over things they put on, unless it was around stations, as then we are never running fast in places like that where we work local. I have never had a rock to derail a train I was on. I didn't have to shovel coal into this engine at all; all I had to do was to turn a valve, and I could sit on my fireman's seat and look ahead and do that, just like the engineer was looking ahead when he ran the engine. I couldn't give no exact estimate on how much that engine weighed; we only have the time card weights, that gives something over 400,000 pounds; you could put the same thing down there that Mr. Goff gave—he knows more about it. I couldn't say what size rail that was, how many inches high it was; I think it is a one hundred pound rail all right, but I couldn't say anything about the weight. I think they are elevated on the outside, higher on the outside than on the inside. Just before you get to that negro church it is almost level. On a curve it is elevated, but what I had reference to, just a little further back you will find on a curve will be level; it will be on a grade but the track will be level this way, one rail will be the same height as another, but when we reach a curve the curvature goes to the outside. I don't know what the correct elevation on the curve is. I don't know what the height of those rails was, I couldn't say. I do not know what degree curve it was. I have been working for the road since 1907. I guess they have had these watchmen on these engines at [fol. 63] least five or six years.

Cross-examination:

I have been running over this particular line of track between Birmingham and Atlanta since January, 1907; and I have run as both engineer and fireman since 1912. I was promoted to engineer in June, 1912; but since the period of depression, certain engineers have been set back to firing. I had a fireman's job at the time of this wreck, and had had for some time prior. I had been running with Mr. Cox as engineer since September of 1932. As to how often Mr. Cox made the trip between Birmingham and Atlanta, going from Birmingham towards Atlanta in the same direction

we were going on the date of this accident, we made twenty-six trips in twenty-four days and then we were through for the rest of the month. We did that each month, we finished up our work on the night of the 24th, and we were through until the first of the next month. We did not make a round trip each day, not exactly; not twenty-six round trips, thirteen round trips. We figured we made our regular turn every time we caught the turn ahead of us, when we came in here on No. 11, we would go out, 11's crew goes out on 40, and we go out on 12, don't you see; but we didn't go on this particular train every day. Mr. Cox and I went on this particular train three times a month. I don't know how long prior to this accident was the last time Mr. Cox and I had made the trip from Birmingham to Atlanta on this particular train; it was just about fifteen hours; we had been in about fifteen or sixteen hours. The last trip I had made on 40 prior to the day of the accident was about eight days before that. On all of my trips between Birmingham and Atlanta I went over this particular piece of track where this accident occurred. I have known of a derailment at that place. H. F. Waters turned over right at that signal [fol. 64] there in about 1921, I believe, about twelve years ago; very close to this same place. He had that Birmingham Special. On this particular day that this accident occurred, we left Birmingham at seven o'clock, and we were due at Bremen, I think it was 10:10. On that morning we got about eight or nine minutes delay at Edwardsville, Alabama. That is eighteen miles west of Bremen. I did not have occasion to observe the time immediately before this accident, nothing other than just through force of habit; you just look at your watch every so often. I looked at my watch there just as we were rounding that curve, as soon as I got on that curve; I say, as well as I remember, it was 10:13, and I just figured that we would be about four minutes late or five down there at Bremen; so that, in that eighteen miles between Edwardsville and Bremen, we had made up some five or six minutes. We were not running so much faster than the schedule time, just a little bit. When we passed this colored church up there I was back in the tank. You know, the tank is just like knocking the end of a box car out, then the ends of the car; I was standing right where you would knock the end of a box car out, just standing on the edge of the tank off of the apron. Standing at

that place, I couldn't see the track ahead of me at all; and standing at that place it was very difficult for me to hear any noises that might have occurred from the running of the engine. What I was doing there at that time was necessary in the operation of that engine; to keep that funnel clear so that the coal would flow in freely. The engine was steaming at the time. It was just after I had passed where that church was that I came out of the tank and got on my seat box; just before we rounded the curve to come up to where the first switch was, but it was after we had passed the colored church. As to whether the engine had run over anything up to that time, I couldn't tell. I was not in a [fol. 65] position to tell, and I couldn't have heard it. If it struck a rock back there and was derailed, I was not in such a position that I could have heard it or felt it, because I was on a different part of the engine, different equipment from the engine. As to whether or not a rock would derail an engine, it looks as though it would depend on the size of the rock and the track conditions. It was a sort of reverse curve there. That didn't give the engine so much of a rocking, swaying motion; those engines hold curves mighty good; but it gave it some vibration or rocking motion, all engines have that when they are coming up like that; and when it has that rocking motion, as it comes over on the left side, the weight is largely on that side, and on the right side the weight is relieved a little bit, and vice versa as it rocks. The first thing that I heard was when we struck the first switch going to the left after passing the church. I heard an unusual noise then. I looked at Mr. Cox when I heard that noise, and he looked at me. I turned my head to look at him, and he turned his head to look at me. He did not put on the brakes at that time. I didn't know what had happened at that time; I thought something was loose under the engine, but I didn't know whether it was on the ground or not; it didn't feel like it was on the ground. Sometimes there is some of those hangers will fall, one side works loose, and maybe one side of it be run over, and it would make the same noise, but not as bad as that, I didn't think it would. It was a different noise from running over a little trash or gravel or something, it was bad all right; and when we struck the next switch that we reached I heard the same noise again; and then when we struck the third switch, that was when it was derailed to the right. I think

Mr. Cox put on the brakes when we struck the third one, just right at the time; maybe just as soon as we were on the second one he may have, it was so quick running at our [fol. 66] speed you couldn't even start to say anything in two car lengths running that speed. It was so quick I don't remember whether he applied the brakes after the drivers got down on the ties or before, I couldn't say about that. I couldn't say that I saw him apply the brakes; I just heard the exhaust like from the brake valve, that is all. That exhaust could not have been the application of the brakes from this Little Watchman; I don't know as it would have been exactly the same noise, I don't think it would be quite that way. When he put on the application, if he put it on, or if the Little Watchman put it on, I couldn't say whether it would all be the same or not; I have never noticed the sound as to whether it would do that or not. I couldn't say that it is entirely possible that the noise I heard that I thought was his application of the brakes might have been the application of the Little Watchman; I couldn't say about that. I think Mr. Cox had good hearing; he appeared that way. After I got on my seat box, relatively Mr. Cox and I were in approximately the same position on the engine; and he had the same opportunities to hear these noises that I had.

Redirect examination:

I was back on the bank just before we approached that church. I got back on the seat before we reached that first switch to the left. The engine appeared to be running all right then, so far as I knew, before I heard that first noise. There was nothing to call my attention to anything wrong until I heard that first noise; I hadn't detected anything wrong myself; and I was up there sitting on my seat, looking ahead. It wasn't but a few car lengths before we had struck the first one; but whatever distance it was I was sitting there a few car lengths before we struck that first switch to the left, and it seemed to be running all right to me. We struck that first switch to the left, and heard a noise; and I looked at the engineer and he looked at me. [fol. 67] The engine continued to go along on the track; it straightened up like and we thought it was all right. What I mean, I didn't know whether there was anything wrong or not; sometimes, you know, as I say, we will run up on

trash on the rail, or on a crossing a little dirt that a wagon will leave there, and that will make that noise. The engine continued along the main line, and it ran on all right. When we struck the second switch to the left I heard a big noise; I knew something was wrong then; and, as quick as that, I heard the exhaust. You see, it is an exhaust; it comes out from the brake valve, that is where you hear it at. When the engineer applies the gauge, that is when I hear that noise. I have heard that noise before. I knew that was the engineer putting the air on, I thought that was what it was; I cannot imagine anything else that it was; but by that time the engine was pretty well off the track. When the brake was put on by the engineer the front of it was already off the track. In running a schedule to arrive in Atlanta on time, it is usual for us to have fluctuations in the speed; when we get a little behind time and run to make it up, that is all right; all of them do that. This speed of 40 to 45 miles an hour wasn't in excess of the rules; we were allowed to run that fast.

D. A. LUNSFORD, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

I am a son-in-law of the dead engineer, James M. Cox. The date of his death was February 14th. I am the husband of this young lady here, his daughter. I first heard of the wreck there near Bremen, in which he was killed, something after 10 o'clock that morning, February 14th, and shortly after that I went up there and examined the [fol. 68] place where it first got off the track and where it finally ran off; we went up there Sunday after it happened on Tuesday. It happened on Tuesday, the 14th, and my wife and I went up there the following Sunday. I went down to the colored church and graveyard there opposite this place where it was said to have first got off the track. I saw a mark where it got off down there, I think it was, I am sure it was, where the wheels hit the crossties. There was little dots there, you couldn't tell what it was, a little smudge on the rail before it looked like it finally got off. I don't know how far that mark extended that looked like

perhaps the flange was running on the rail, before it finally got off, about three feet, something like that. I walked 50 or 75 feet I reckon down the railroad, on further. I also went up to the point where the engine finally turned over, at the first right hand switch and before I got to the right hand switch, I went there first and walked back up the track. I didn't walk all the way that day, I did later on. That day, Sunday, I went down there and saw the place in front of the colored church; and I also saw the place near the right switch. On the 10th of April, 1933, some 50 days later, something less than two months later, I went out there again with Mr. Orr, the photographer who has been on the stand here, and he took a number of photographs, that was the day I walked all the way from the church. The track and the ties and all were in substantially the same condition when Orr took the photographs that they were in when I went there Sunday. I went there later on June 1, 1933, with your son, Mr. Tom Arnold, and took some small photographs again. I took my kodak and took one. This picture No. 1 was made toward Birmingham from where the derailment took place; we taken it ten rail lengths west of —. The length of a rail is about 39 feet I think, I am not positive about that. We took ten rail lenghts, looking [fol. 69] toward the scene. That is a correct view of it, and that's the way it was when I first went there. The next one was taken a little further toward Birmingham, you can tell that by the picture. This was 14 rail lengths west of the initial derailment, the mark that I took to be the original derailment. No. 3 has me with a handkerchief wrapped around my hand at a point on the rail; the point on the rail that my hand points to was about 15 feet west of the point of derailment. This one (indicating) shows the point of derailment. He photographed me in No. 3 right where the first derailment occurred. Picture No. 4 is a close-up of the ties at the point of derailment. Looks like the two ties in there are mighty close to the point of derailment, I remember it was taken pretty close to it; this memorandum says three or four ties west of the first wheel mark. I remember it was real close to it. It was west of it. Those two ties that are shown in that picture, the first one from the left side and the second one, were in that same condition when I went there Sunday after this wreck on Tuesday. Those two ties looked like they were pretty badly obliterated and

rotten, bursted and marked with the wheel. The left-hand tie looks like the spike came right in that split in the tie. The wood of the tie is missing from under the spikes; there is not but one spike in it and it is missing from that; I mean the plates—it is missing from the whole on the other side. The rails rest on the plates. There is one spike on the outside in those plates. There is a hole from another spike there; there was one spike missing from every plate. In this picture No. 4, the right-hand ties, there is one spike on the left to the place that joins that tie. As to there being any wood for it to catch in, the spike might catch, but very little, down at the sharp point. That's the way it was at that time. Picture No. 5 shows me pointing at something there on the cross-tie; I am pointing at a cut [fol. 70] on that cross-tie. That is about 20 feet east from the place where I saw the first initial derailment. That mark on the tie looks just like where a wheel ran over it. I saw marks continuing along on those ties. I saw some ties with two marks on them, one on the inside from the left wheel and one on the outside from the right wheel. I saw marks of both wheels on the same tie. There were three ties having very plain marks on them that I am pointing to there in No. 5. Picture No. 6 shows the general sweep of the track on the curve and the reverse curve in it there, I recall that scene. I think that is a correct picture. It shows the first curve after the derailment looking from near the scene of the first derailment, the first curve after the first derailment. Picture No. 7 is about 30 feet west from the right-hand switch three-quarters of a mile away from where the first derailment of the trucks occurred. Where I am there is 30 feet west of that first right-hand switch. Those things I am pointing out there on the ties are the marks made by the flange of those front trucks. There are also marks on both the same ties on the outside of the right-hand rail going toward Bremen. Picture No. 8 represents the ties; it shows the condition of the cross-ties. With reference to that final right-hand switch, that picture was taken about 30 feet west of it, practically the same spot as No. 7, but a different direction. The condition of that first tie to the left is bursted. That was in April, 1933. The picture shows the condition of that tie on the right. Skipping one tie and then going to the tie next to the little box under the track with the wire running into

it, that is the condition that tie was in in April. The condition of the other tie next to the box there that the wire runs into, that is the way it was in April. A train came over that last place where I have shown these ties and this box in Picture No. 8 about the time that photograph was being taken. I saw the train come over that point in the track, [fol. 71] and as the wheels went over it the track would sag I would say between two and three inches as every truck went over it; and when the wheel would get off of it it would go back up. Picture No. 9 was taken a little further west than Picture No. 8, a little beyond the left switch. It was toward Birmingham—I mean toward the last switch, toward the east, further east than picture No. 7. It was not taken after I passed the last switch; it was taken on the other side of that, toward Birmingham. That is a correct picture. On June 1, 1933, I went down there again and looked at the track, and some photographs were taken by Mr. Tom Arnold. These pictures are numbered 10, 11 and 12. No. 10 shows the marks of the flange of the wheel on the cross-ties on each side. Beginning at a point near the colored church where the trucks first got off, the marks of the flange shows on the same tie on both sides of the rail, on both the inside of the north or left rail, and the outside of the south or right-hand rail. I have a memorandum in my pocket for something like 40 or 50 feet where I counted the ties where the wheel flanges marked both of them. Pictures 10, 11 and 12 are correct; they have got me in them; I know they are.

Q. Now I wish you would take any memorandum you made, if it refreshes your memory, and let's begin now; here's where that front truck wheel first ran off the track. We are going toward Bremen. Here are the two rails. Tell me by the rails, in the first 40 or 50 or 60 feet, where you see the mark of the wheel on the inside of the left rail, and another mark corresponding to the other wheel on the same axle on the outside of the right rail.

A. The first three—the first three rails after the derailment. Here's the mark where there was the derailment; [fol. 72] the first three were marked on the left-hand side. After the mark showed the wheel got off, the first three ties had a mark on the left side, inside the left rail. The next three, No. 4, 5 and 6, didn't have any mark that you could be sure there was a mark; it looked like it didn't hit

them; I couldn't be sure about that. No. 7 had a mark on the left side, which was on the inside of the rail. No. 8 had a slight mark on the right-hand side. It didn't have one on the left side, and a slight one on the right side. Now take the 9th tie, there was a light mark of the flange on the inside of the left rail, and a heavy one on the right, on the outside on the same tie. Both wheels of that axle made a mark on the same tie. No. 10, I couldn't tell any on the left side, but there was one on the right side. No. 11 was marked slightly on the left-hand side and heavy again on the right. 12 through 18, seven ties—that is, 12, 13, 14, 15, 16, 17 and 18—were hit on both sides, every one of them, by the same wheel that got off there; hit both sides, one wheel on the inside and one on the outside. The marks on the outside were directly opposite the marks on the inside. No. 19 was hit on the left side and had a light mark on the right side. No. 20 and 21 was marked about the same on both sides. That's as far as I have got a diagram. I walked all the way up there; and off and on all the way up there I often noticed some tie was hit with the same wheel, sometimes one would be marked, and again you would see where it was marked on both sides. The condition of the spikes on the right hand side going toward Bremen at the point shown in picture No. 9 is that they wasn't down; you could lay your two fingers up under the head of the spike, between the spike and the rail. That is the one I am pointing at; that's the one I put my two fingers under, and is on the outside of the right-hand rail going toward Bremen. That was in April, 1933.

Cross-examination:

This reference to the spikes being loose is on picture No. [fol. 73] 9; and the picture that I have there and that I refer to where those spikes seem to be up are not on the right hand sidetrack. I don't know that that's where the derailment occurred; the sidetrack is down further; that was just before the derailment occurred, just before you got to the derailment. I don't know that right here (indicating) is where that sidetrack takes off, it is not. There is a left switch that takes off up there somewhere. That is on the main line. There is only one right-hand switch. There are three sets of rails shown in that picture; you can see three whole sets, except down here further; that's the left-

hand switch. The right-hand switch is down here further, it is not in the picture; one of these other tracks might run out, I don't know. I said something about tie plates, two holes in the tie plates; I don't know what those are for. I have never had any railroad experience, and don't know a thing in the world about railroad construction. I have an idea what those are put there for, but I don't know; I wouldn't say I knew. They were all along the track as far as I went. On the outside of the rail there was only one spike in the tie plate. As to ever seeing a place on the railroad that that was not true, just one spike on the outside, I never paid any attention to it; I never looked at it anywhere else; everywhere I saw it over there that was true. From where the wreck occurred that was brand-new track; I never paid any attention to it. That was where the wreck occurred. I am talking about at the church, I went down there. The wreck didn't turn over there. There was no track torn up there; no new track there; no new construction of any kind there. Therefore, from the point where I went, up west of the final point of derailment, beyond that church, I saw just one spike in those tie plates on the outside; and on the curve there was two on the inside; and those two on the inside were right there at that [fol. 74] point. As shown on this picture No. 4 there are two on the inside, and two on the inside of this rail (indicating). As shown in picture No. 4 those two ties are right close to the initial derailment; I don't know how far, three or four or five feet west; it was toward Bremen; no, I am mistaken, this was toward Birmingham from the initial point of derailment, just before the wreck occurred, three or four feet. I know where I was shown the initial point of derailment was. I don't know except the marks there and where the officials of the Southern Railway put some brush. I saw the brush. I saw it in the paper that they did and I heard that they did, and I saw the mark on the rail. I saw it on the rail, and first derailment. I saw it in the paper and I saw where the rail was marked. I don't know what sort of mark was on it, a kind of a smudge-looking mark, where it was sliding off. What I mean by smudge is where you could tell where the rail was kind of cut or marked by the wheel, looked like. I have never seen a wheel make a mark like that, I never paid any attention to any marks made on rails before. I didn't see it

make that mark, so I couldn't swear that it did. I have never had any experience in keeping up track, nor have I have had any experience in determining what was a good sound tie that would hold a spike. I don't know as I have ever watched at any other point where a train would go over a tie, a place like that, particularly. I don't know that when the weight of an engine goes on to any part of a railroad that there is more or less give to that track; therefore when I saw it give at that point near the right-hand switch, so far as I know that may have been the normal thing that happens every time a train gets on a piece of track. It might happen at every other place. I live at East Point. I am engaged in office work, working for the C. W. A., in the office of the C. W. A. I have been working for them about three weeks or four weeks. Prior to that time I worked at the Georgia Cotton Growers Asso-[fol. 75] ciation office. When working for the Georgia Cotton Growers Company I received $140.00 a month. I am receiving $18.00 a week now. My wife has always eaten. I have bought some things and my father-in-law has bought some things. He give us the rent of the house; after his wife died we moved out there and he give us the rent of the house, and he paid for my wife a maid; we had a maid one or two days before the accident, and when we moved out there he told her he would pay the maid $20 a month—but he never had done it, he never had hired any other maid; I mean just before my mother-in-law died. I was just occupying his house; my wife and I; and kept house there and he lived with us when he was in.

Redirect examination:

Somebody else helped me take care of my wife and that was my father-in-law. My father-in-law's wife, Mrs. Cox, died October 30, 1931. Mr. Cox owned a house in East Point. He gave his daughter the rent of that house. I would say that rent was worth $35 or $40 a month; that is the prevailing rate of rents in that section; it was the best house on that street. I wouldn't say that the old man cost my wife anything at all. Most of his nights were spent in Birmingham. His runs required him to spend them there. A room at my house was not kept for him; occasionally my mother spent the night with us and—I don't see where it cost my wife anything to keep that room for him. He gave

her the rent of the house. As to what else he contributed for her comfort and support of the way of employing a servant, he hired a maid, paying her $20 a month, and when we moved out there there was about eight tons of coal in the basement and he gave her that, and the following winter he bought her a gas heater, and he gave her a Ford automobile; that was before his wife died, Christmas of 1930. He gave $450 for the Ford, if I ain't mistaken. That was [fol. 76] his house; he had occupied it and turned it over to my wife for occupancy. He gave her a nice dining-room suit and a bridge lamp and a table lamp. I don't know what the dining-room furniture cost. He gave that to her in February before he was killed—February, 1932, I think; I am not sure about those dates. The old gentleman, when he was in Atlanta, made his home in that house. He idolized our child; he would give him a dollar every birthday and he was always giving him pennies and chewing gum. He was one of the family when he was in the city. For the last year I don't believe he would average over one night a week in Atlanta. He was 59 I understood. These yearly statements stamped with the stamp of the Southern Railway for income tax return purposes were gotten from the old gentleman's effects. In a general way he made something over $300.00 a month.

Recross examination:

When Mr. Cox's wife died he was not in town enough to keep house for. We didn't go out there to keep house for him; we went out there to save money. He would come in sometimes 11 or 12 o'clock and leave at five or six, in a few hours—I wouldn't call that a whole night; we wouldn't see him when he would come in at all. As to whether he made his run from Atlanta to Birmingham one day and came back from Birmingham to Atlanta the next day, I wouldn't say that he did every day. I imagine the day that he was off he was in Atlanta; sometimes he spent the extra days in Birmingham. I remember when he stayed there and had some dental work done. The three or four days he was not running he would always go to his brother's or sister's or something. He was always in Atlanta when his run come in, I am not familiar with that; I didn't keep up with that, it was none of my business.

[fol. 77] R. L. HOLCOMBE, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

At the request of Judge Edwards and you I went down the Southern Railway track near Bremen and looked at the track at certain places. Judge Edwards and you and your son went with me. On the day this wreck occurred, February 14, 1933, I heard of this wreck. I was an officer of the law in this county at that time. I held the office of Deputy Sheriff. I hold the same office now. I went down there to that place and looked at that scene opposite that darky church and graveyard down there. There was just a little pile of sand rock, crushed on the rail, practically in front of the church, where the train derailed. I don't think I noticed any on the track. That little crushed sand was just possibly off the flange of the rail; no great sight, a small amount, I think there wasn't much more than two handfuls, I don't think there was. This (indicating) is similar to it. That looks like sand down there in the bottom, it was something of that kind. That stuff was just off the bottom of the rail, the flange of the rail you might say. I noticed a mark on the face of the track, the right-hand track; I remember a mark on the rail, it finally dropped off onto the cross-tie. It was some distance as I remember to where both flanges seemed to hit, possibly they didn't at first. I show that memorandum there. I think that memorandum is correct, I have looked over it. We made that at the time. The left wheel alone hit the cross-ties after it derailed, the mark being shown on the left of the tie, inside the rail. The left wheel hit the first three ties, the mark being shown on the left side; then the next three ties bore no marks; then the seventh tie was hit on the left side alone; then the eighth tie had a slight mark on the right [fol. 78] side; then the ninth tie was hit lightly on the left and a heavy mark on the right; then the tenth tie was hit on the right side only; the eleventh tie was hit on the right side and slightly on the left; then six ties, from twelve to eighteen, were hit on both sides; the 19th tie was hit on both sides, but on the right side lightly; and the 20th and 21st ties were hit on both sides. We made that memorandum at the time. I did some measuring of the rails and things there and made a memorandum of it, Mr. Swint and myself.

The top of the rail at this point of initial derailment is six and three-quarter inches above the tie, our measurement. I measured it. I put a rule on it and saw that it was 6¾ inches above the tie. The mark of the flange of the wheel on the tie at the second left switch was 10¾ inches from the rail. That was measured. There is a dirt crossing near those two switches, and from that point down there where that church is to where it finally ran off is practically three-quarters of a mile, to where it finally wrecked. I saw the wreck of the engine up there. The cross-ties, as I remember, was practically rotten. They were partly rotten at the church and near this place. The top of the rail above the tie, counting the tie plate and everything, is 6¾ inches above the tie. Here is Bremen (indicating on diagram) up here, down here is that church, here is the mark of the first derailment down there by the church; looking at that curvature, and looking at that left switch going out and then the second switch to the left and then the right switch, that plat fairly represents the situation according to my recollection. At this second left switch here I noticed marks on the ties of these wheels. The mark on the left side from the rail was 10¾ inches. There is a crossing just about four rails west of the second left switch; there is a place there where there are some steel rails put across that crossing. The rail on the inside is broken, and on the same cross-
[fol. 79] ing and on the same cross-tie an outside rail is broken, each three or four inches from the rail; one is on the inside and the other is on the outside; they are broken. There were some spike heads marked as if they had been bruised and had come in contact with wheels or something; on many joints the spike heads are marked. The first mark of the wheel flange that I saw, inside the rail on the left, was 9½ inches from the rail. I found a small mark on one of the ties down there 18 inches on the inside of the rail; and on the outside of the same rail and mark of the wheel was 7½ inches on the outside. There were four ties right together all showing inside and outside marks there. I went out there with Judge Edwards and you on a day last week; and Mr. Cox, who sits over there with his wife on the first bench, came along while we was there. I am shown a picture here, looking across the track toward that house there, the little outhouse and all; I remember that view over there. I remember some new ties being placed there. That

picture was taken in April, 1933. I remember the place shown in that picture. A passenger train came by there when we were looking at that place. I got there and saw that engine. I think that picture represents it as it looked turned over on its side there, as good as I could get at it. We will mark that No. 13. This one marked No. 14 also represents the way that engine looked. I didn't see that after they stood it up; I saw it when it was lying down like 13 and 14 show it.

Cross-examination:

All these measurements and examination of ties and marks on the ties to which I have testified was made some time in December I think, before Christmas, approximately a month ago, that is my recollection; and I was there again last week; and some of the measurements I am now testifying to were made there with Mr. Arnold and Judge Edwards. Prior to that time I had made no measurements of any kind. The marks on the ties that I am testifying to [fol. 80], are marks that I saw there in December and last week, I saw those marks of the flanges—and they are still there; the same ties under the track, probably there may have been a few new ties added at different places; but if so it was just scattering, here and yonder, that is my recollection; seems like I remember five or six in one place, new ties, at some point or other; I don't remember for sure just where that was. It was probably where the train first derailed, I think; I am not sure about that; but the great bulk of the ties are the same ties and show the same marks that they did the day of the accident; that is my recollection. I went there as an officer with the sheriff and Mr. Swint, and at a point on the track immediately in front of that church, on the outer rail of a curve bending to the left, I found there evidences of a crushed rock. There were portions of that on either side of that outer rail. That was one of these hard, smooth sand rocks, what some of them call sand rock; such as you pick up around a stream that has been washing along; you usually find them there. I don't remember seeing there just a few feet from the track a place where a rock had been taken from out of the ground; I remember seeing some small tracks, seemed like boy tracks, just before I entered into the road, 15 feet from the railroad or something like that; I don't remember so

much about the rock hole. It left some ground-up dust that indicated not a very large rock, you might say an inch and a half thick or something like that and maybe two inches wide and three or four inches long in my judgment. I got down there in the afternoon I think, probably 1 o'clock. The wreck had occurred some time that morning, about 10:30 I think; and the place where this rock had been crushed, they had placed somebody at the place and brush or something over the footsteps around there, I remember that. It had been raining and there was some mud there, and I saw evidence of footprints leading to [fol. 81] the track and leading away from the track, and I saw some brush had been placed over that to prevent it being disturbed. Other people were walking around there, in two or three places at least, a couple of places or more. Up at that point of the initial derailment, immediately in front of the church, the track was in no way disturbed up there, out of place or anything of that sort. There was no ties knocked out of place. The only thing I noticed was the imprint of the wheel on the outside of the east rail, and on the inside of the west rail there was some imprint there on the ties. While I was there I don't think I saw any trains pass over that piece of track; I wasn't right at the place all the time, I was two or three different times, and off— During the afternoon I might have seen trains passing from Bremen toward Birmingham, but I don't remember about that; I didn't stay at the track long; I took a trip two or three miles out. I don't remember any trains coming from toward Birmingham to Bremen. Where the engine turned over was up at the right-hand switch. The track was torn up where the train was lying. There was probably some portions of the distance between where it first derailed and where it turned over that I didn't see that afternoon. This photograph No. 14 that I have just identified, that is taken from a point back toward Bremen looking east, and it doesn't show the condition of the track that the train had come over and the torn-up portion of the track. This picture No. 13, that is a picture of the engine. The rails underneath that engine were torn loose from the ties on the outside, and the ties all thrown in every direction. There were a number of of cars of the passenger train off the track, and they had

twisted and torn the track back there. I don't remember so much about back to the place of this iron rail crossing; I was not noticing it; I noticed it more back where [fol. 82] it first derailed and then back to the wreck. But I think the only place that the track was torn up was down on the right-hand switch and in that immediate vicinity some seven-tenths of a mile from the point where the trucks were initially derailed.

Redirect examination:

The engine when it was finally turned over, as shown in these two pictures, was 100 yards from the right-hand switch, or something like that, some distance. Of course, right where this engine was turned over the track was all torn up and for some distance back. I don't think it extended back west of that right-hand switch; my recollection is that it didn't.

Recross examination:

My recollection is it was not; the track was not torn up back some distance down to the first right switch.

Redirect examination:

New ties had been put in that place when I went there last week. That is picture No. 8. In other words, those ties are not there now.

MRS. LUNSFORD, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

I am the daughter of Mr. James M. Cox, engineer on the Southern road, who was killed February 14th last year. I am married. My mother was dead at the time of my father's death. She had been dead about a year and a half. After my mother's death my father lived with us. He had a residence there in one of the suburbs of Atlanta, East Point. There were six rooms and a breakfast room in that house, and was a modern house; plumbing, bath and all sort of modern improvements. After my mother's death my husband and I and child moved into the house

with my father and lived there. He turned the rent and [fol. 83] use of the house over to me. The rent of that house was worth, taking the prevailing rate for houses like that in that neighborhood, between $35 and $40 a month, something like that. My father contributed to me by employing help; he hired a maid for me and paid her $20 a month. I had that maid all the time I lived in that house that year and a half. My father gave us other things from time to time; he gave us a Ford just a little while before my mother's death. He gave me some furniture for the boy; he gave the boy a dollar a month for his bank, and trips he was in he gave him nickels and dimes for his bank; he gave me a dining-room suit and several other pieces. My father's age at the time of his death was 59. His health was good. He smoked a little bit, very little though; he wouldn't spend very much on smoking. He smoked a pipe mostly, occasionally he would smoke a cigar. He would buy just little cans of tobacco, Prince Albert. He wouldn't buy over three or four of those a month. They cost fifteen cents apiece. He smoked mostly a pipe and a very little one at that. He would buy about one winter and one summer suit a year. His winter suit would cost him fifteen or twenty dollars I guess, and his summer suit would cost him eight or ten dollars, something like that. He was very easy on shoes; he bought about two pair a year. He would pay three or four dollars a pair for them. He worked in overalls when he ran his engine, and they cost a dollar or a dollar and a half a suit. He wouldn't use over two suits of overalls a year. I had charge of having his underclothes washed and laundered for him. He would get about two winter suits and two summer suits, new ones, every year. I really don't know what those would cost him, a dollar and a half a suit at the most; he bought very cheap clothing. He stayed at night very often in Birmingham. I think there was another railroad man with him. He stayed at the Terminal Hotel in Birmingham. I [fol. 84] paid a bill for $5.25, I think it was, and I think it was for two weeks; that would make it about $11 a month for his room, something like that. I don't know what his meals cost him. He spent about one night in the week at home, and about six nights in Birmingham, or on the road. When he came in on 40 he would eat dinner at home. He didn't always come in on 40. He ran passenger

trains, but he ran all of them, extra passenger work. I don't imagine he would go over 25 cents a meal the way he spent for other things. His regular expenses, outside of his clothing, would not exceed $35 per month; and his clothing that I have described, in addition to that, his two suits of clothes a year, winter suit and summer suit, is about the expense he incurred. He was not a drinking man at all. He paid $20 a month for my maid.

Cross-examination:

He only went about one night a week, one whole night a week in Atlanta at my home. He didn't run between Birmingham and Atlanta and would spend one night in Atlanta and the next night in Birmingham, and the next night in Atlanta, he didn't do that. He spent most of his time away from home. I saw him very rarely, his lay-over was mostly in Birmingham. As to what his expenses were in Birmingham, for meals and other expenses, I don't imagine he would spend very much, about 25 cents a meal. I know that because he didn't spend very much on himself, and I have been with him when he bought things for himself; before his death, I don't know how long ago. I was never in Birmingham with him; he came in on 40 occasionally and I would be with him then. I have an idea what he would spend on meals in Birmingham. It is not just a guess, I have eaten out with him in Atlanta. I don't know the definite amount of his expenses in Birmingham. I know about what he paid for his clothing; the price tag was on the suit when [fol. 85] he would bring them home. My mother died October 28, 1931. Prior to her death my husband and I had been living to ourselves; and my husband had been supporting me in a way. What I mean by "in a way", not in the way I was supported after we moved in this house; and after my mother's death my father simply asked me to move out to his house and he would live with us; and I charged him no board or room rent or anything of that sort. My father had an automobile. He had had that automobile, the last one, the one he had when he died, I can't be positive, about a year I think. He had the expense of that automobile, the upkeep of it. He kept that automobile in the garage; when he was on the road it stayed at home, there at the house. He used it when he had a little business to attend to. Every month-end he would go to his sister's

or brother's or something like that. I just couldn't be positive whether toward the end of the month; he would usually finish up his month's work about the 24th, I didn't keep up with the dates; I just couldn't be positive whether he would only make twenty-four or -five trips a month. Always at the end of the month he had a few days off, and he went to his sister's and brother's, visiting his relatives, and he would use the automobile for that purpose.

Redirect examination:

My father had a room at the house; he did not cost me anything at all. My husband has lost his position with the cotton people; and he finally got a job with the government under the Civil Works Administration. He is making $18 a week now. I have used my father's auto at times. My father was out on the road most of his time.

Recross-examination:

I just don't know exactly how long my father had been running as an engineer; he started running when I was born I guess, I just don't remember exactly. He has been running as an engineer something like 30 years or more. [fol. 86] He owned a home in East Point at the time of his death. That is the house I am speaking of now. He had no other property, that's all he had; that and the automobile was all he possessed at his death.

H. A. Cox, called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination:

My name is Hubert Allen Cox. I am the son of Mr. Cox, the engineer that was killed February 14, 1933. I am 39 years of age. I was a railroad man, I would say, around 15 years ago. I worked for several different roads, and worked for the Southern between six and seven years on the west end, between Birmingham and Columbus, Mississippi. I ran several trips between Atlanta and Birmingham. I had a stroke of paralysis, it will be four years this coming March. It left me in a very bad condition; I am not able to work, I can't hardly walk; I haven't got any balance of

myself and I have to use a stick to walk. What makes it difficult for me to walk is that I haven't got any control of my ankles; that is where the paralysis is. I haven't been able to do anything except drive a truck and one or two other things since I had this paralysis. Up to the time of my father's death, and since I have been paralyzed, my father supported me and my family. I am married. This lady is my wife, and that little girl is my step-daughter. I married a widow. In the last four years, up to the time of my father's death, he contributed to me, I would say, on an average between $40 and $45 a month. Some months he would give me $40 and some months it would run up as high as $60. He gave me the cash; he gave it to my wife mostly. That was all done for my support and the support of my wife, who was dependent upon me. I tried to work but I [fol. 87] found I couldn't; I tried to drive a truck. I delivered ice. I can drive a car. I didn't make anything at it at all. My father bought the truck and gave it to me. He paid $250 for it. It was a Ford truck, ton and a half; he bought it second-hand. Since his death I have been living in Meridian, Mississippi. For a while I lived in Atlanta. I have made an effort to get work with the C. W. A., but they turned me down; they said I had an automobile and $20 a month and was not entitled to it. My wife and I both went to them and wanted to do something. I wanted my wife to take a job as a home solicitor, home visitor, and you have to use a car and drive all over the country. I examined the Southern Railway track down there by the side of that church down there last Thursday. I went up three-quarters of a mile to the first right-hand switch and looked at it there too, there the derailment was; I mean just before it turned over. I picked up also some of those rocks that were lying around opposite the church, around the track, to see what material they were. I am shown picture No. 4; it does not represent the condition the ties are in now. This is the church where the first derailment occurred. These ties are practically the same. I railroaded, I would say, around 15 years as locomotive fireman. I picked this rock up near that place. It is pulverized into sand here, I did that; I taken it to my sister's house in Atlanta and taken a hammer and tapped it about as hard as you would tap a pecan and it crumbled up. I tapped it with a hammer and made that sand out of it. That is the kind of rock that I found near

this place. Mr. Holcombe, the deputy sheriff, was along when I found that rock; the gentleman that was on the stand this morning. In my experience as a railroad man my train has run over rocks and objects of that sort on tracks time and again. I have run over road crossings for a distance of as far as from here to the wall over there with dirt [fol. 88] and rock and sand on the track. I never had anything like that to derail the train; I never heard of a rock of any kind knocking a train off a track at any speed at all. In that particular curve, that rail sets in a kind of slanting way, and most all other curves they sit kind of this way (indicating). I don't know much about the degree of curves. If a rock had been lying on the track, in my opinion the vibration of that heavy train would have shimmied that rock off of there, because the engine and cars striking the rail joints, there is a tap to it, and the top part of the rail is very narrow and slanting and very slick. I have run over rocks a great many times with trains that I have been on. I have run through water for a distance of three or four miles two feet deep, running over limbs and treetops and rocks and other things. When that rock is struck by an engine weighing, say, 140 or 160 tons, in my opinion it would knock it off, it might. If it hits it and runs over it, it just crushes it up. That rock crushed up is almost the same as common sand. You sand the track to keep the engine from slipping when starting the train. We use sand lots of times just about the same as that on locomotive engines, with pieces almost as large as these coming out of the sand pipe. I couldn't tell you exactly how high the cow-catcher sits above the rail; of course, it will vary, because after they put them on they will sag; I would say 2½ to 4 inches. When they put a new pilot on there I would say it is around five inches or a little better. After they run a trip or two the vibration of it will settle it down to around 2½ or 3 inches, maybe four. About the average height from the pilot to the ball of the rail would be about four inches I would say. Any rock that would be as high as that, four inches or four and a half or five, that pilot would knock it off. The pilot extends over the rail. A wheel itself doesn't always crush a rock; it knocks it off. [fol. 89] Before my father gave me this last truck, he bought me two Ford cars before that, and he put me in the pressing business twice in Atlanta. I was not able to make any money

out of it; I didn't have any success at all. Besides this money that he gave me, he practically bought all my clothes. He bought the suit I have on now; he gave $11 for it. It is a duplicate of the one he had; I have got that at home now. He was about my size, maybe half an inch taller. He bought all my clothes. I wore out about one suit a year. Generally when he would get him a suit he would come and get me and go and buy me one.

Cross-examination:

I can drive a truck pretty fair; I can drive a car all right. In order to drive a truck you don't have to have a good deal of strength in your ankles; you don't have to have any in your ankles at all, you are sitting on a seat. I can sit back against this place here and push this desk over and yet not have any strength in my ankles, because you are pushing from your back and hips on the brakes and clutch. I have got a straight movement of my legs, and sitting in a car I have that straight movement, because I am very short. I have the same thing in my car. That doesn't require strength in my ankles to amount to anything. I made a failure twice in the pressing club business. It was not exactly a failure in the ice business; I had to give it up on account of the trust raising the prices on us and we seen there wasn't any use to operate. When my father would furnish any money for the benefit of my family, he would always give it to my wife. If he wanted to buy me anything he took me to the store and paid for it himself. I was a locomotive fireman, and have operated on a passenger train. I couldn't tell you exactly how many times, mostly on the Illinois Central, between Birmingham and Jackson, Tennessee. I fired the Seminole Limited between seven and nine [fol. 90] months is my recollection; and I did fire on the G. S. & F., I couldn't tell you exactly how long, right after the Florida boom; three or four or five months, something like that. Of course, I have been on passengers at different times. I would say I have had around 15 years experience in railroads. You know there are times when you are cut off and may not work for three or four or six months, but still we call that railroad experience. During that time I have worked for the Southern out of Birmingham, the Southern between Atlanta and Macon, the G. S. & F., the Illinois Central, the Northeastern, I didn't make but two or

three trips there. I was on the A., B. & A. along about 1916; I worked over there a trip or two; that's about all I can remember. I had no regular job, an extra man has not got a regular job. I had a regular run on the Illinois Central, and I had a regular run on the west end of the Southern. I couldn't say exactly how long I had a regular run; we might hold a run three or four or five months and get rolled and be on the extra board four or five months and bid in another regular job. The rock I spoke of, that's the rock I got down there last Thursday, nearly 11 months from the time my father was killed. I don't know what size the rock was that was on the track at the time the engine run over it; I didn't see the rock. I know nothing whatever about the rock that the train actually struck over there on the day when it was overturned, only this rock corresponds with the piece that they say was run over. I said a little while ago that I picked up a little piece of this rock that I have that I got there last Thursday, and I said that they sometimes sanded the track with pieces almost as large as that; and that was a little piece about the size of that you have in your hand, about 1/16 of an inch in diameter, as going through the pipe. I was not familiar with the particular engine my father was running at the time of this [fol. 91] accident, but I have railroaded with engines of the same type. I don't know how high the cow-catcher sat above the rail; none of them are the same height. The only time I have ever been to the scene of the accident down there was last Thursday. I couldn't say what was the largest rock I ever ran over with an engine; I would say something nearly as large as your fist, and that was a passenger train, running, I would say, between 40 and 50 miles an hour; on curved and straight track both, road crossings. Down where I run it was not customary for rocks to be on the track; it is not customary to put them on there. I didn't find that frequently myself. I said several times, that may have been three or four times in 15 years. I said a moment ago in response to Mr. Arnold's question that I ran through water and over limbs and rocks and things like that. I could tell what I was running over because I could feel the weight of it when we went over it; you could tell it was a rock, and you could tell it was a limb when a limb would come by. That was on the Illinois Central, the other side of Corinth, Mississippi, running on the Seminole Limited.

I just crept along through the water; there is more danger jumping the track running three or four miles an hour than there is at fifty, running over rubbish or anything like that, and especially around curves; it would be far more dangerous at three miles an hour than it would at fifty.

Redirect examination:

When I was running the ice business I had a helper to deliver my ice; I had my uncle and another boy.

C. G. Goff, called as a witness in behalf of the plaintiff, first being duly sworn, testified by deposition as follows:

Direct examination:

My name is C. G. Goff. I am the master mechanic of the Southern Railway Company located in Birmingham. The [fol. 92] track of the Southern Railway that runs from Birmingham to Austell comes under my jurisdiction as master mechanic; within about fifteen or twenty miles of Atlanta. I recall the accident in which the engine was wrecked on which Mr. James Monroe Cox, the decedent, was riding, I recall the accident, but I couldn't say as to the date; it was the time Mr. Cox was killed; February of this year. That train, over our line, was from Birmingham to Atlanta. It was a passenger train. I don't recall how many coaches it pulled. Mr. Cox was the engineer, and Mr. Goree was the fireman. I don't remember who the conductor was; the files will show. I did not see that engine before it left on that day, on the 14th day of February, 1933. I couldn't say when I had seen it or examined it before that day; I am accustomed to looking around the engines in the roundhouse, but I couldn't say as to just how long prior to that time; I couldn't give you any exact time on it. That type engine was what is known as the U. S. Administration mountain type. It had four driving wheels to the side; eight altogether, we call them four; there is four drivers, four wheels on each side, and the axle between, of course. There was a wheel under the cab. In the way of front wheels, it had two engine truck wheels, that would be four wheels, the two truck wheels; four wheels, and two on each side and an axle between. Those four truck wheels were in the very front

of the engine. Right off hand, I couldn't say what the weight of that engine was; I wouldn't like to make that statement. I can get it for you over the telephone in a couple of minutes; that ought to be in the files, I expect. We don't figure the weight of the tank; I don't think it ought to be figured, there is so many different kinds of engines, we have so many different types; you want the weight of the engine, not the tank. The weight of the engine was 327,000 pounds (after telephoning). That engine was manufactured by Baldwin, I imagine; I am pretty sure it was, Philadel- [fol. 93] phia. That engine was built during the war under the government; that is where they get the name U. S. Administration type. As to what kind of a framework there is that keeps those wheels together, and that the engine rests on, it is a steel frame with a casting in the center of it and pedestals that fit over the boxes that go on the wheels; you see the box goes on the wheels, on the axles; then the pedestal is fastened to the frame and it fits down over it. That is not the casting I am talking about (indicating on blueprint); the pedestals are fastened to all four corners of the frame, and they slip down over it just like the shape of my hand here. I could draw that roughly; there it is, the center casting, it comes down like that; that is the shape of it (indicating on diagram) you see here is the frame, that is a side view of it looking down on it, here is the pedestal, here is the axle, here is the box slips down on the axle, and the pedestal slips down over that, and this casting here is in the center of the frame; here is the casting on the engine that fits down inside of this where it drops in there like that; this is the engine up here; this is a side view of it; here is the front end of the engine here. That is the way it is; here is the front of the engine, here is one truck wheel, and here is one here. Let's draw that front of the engine, there is your cylinder, the cylinder is right in here, and here is your stack on up here. This thing that you are marking out here is the center casting. The center casting on the engine fits into the center casting on the truck, what we term the male and female center castings; the male goes into the female. This No. 2 here is the casting that is fastened to the steel truck frame; and the part called the male No. 1 from the engine goes into this opening No. 2 on the truck frame. As to how far in there it goes, they vary; this particular one was approximately 3 inches. There

[fol. 94] is a center pin that goes down through here to hook it in there and keep that No. 1 from coming out if there should be any rise in the front end of the boiler; that goes through that way; that center pin is marked 3; it is not keyed at the end in any way, it just rests on gravity, the weight of the engine is all that holds it in. If the engine was turned upside down, it would fall away from the truck. The weight of the engine hooks that truck into the body of the engine or the boiler of the engine and safety chains. Those chains are located on the front end of the truck frame. This would about show where they are, somewhere along there, right at the front end; they fasten to the main frame of the engine. There are none right on the back; they have just two chains on the two front corners of the truck. To make myself clear, it is a matter of impossibility for the engine to get out of the center casting unless it is derailed, because the weight of the engine holds the truck on the track; the weight of the engine would hold it as long as the wheels were on the rails; but if it got derailed, that center casting would get out, by the truck dropping; the truck would drop, and the belly of the engine would be held up by the driving wheels; and that would enable the truck to drop. In this little rough drawing we have got here, that you have marked "A", this is a side view of the frame here. You see that truck frame—those are rails I am drawing there, that is looking down on it; you see, here is the frame made in this shape, and the center casting is in here, and here is your wheels on either side. This second figure we have drawn on this rough paper "A" looks down on the truck frame; and these 4's represent the wheels; figure 5 represents the axles; and figure 6 represents this center casting, by which the engine reclines on the truck by its weight. You see, there is two springs here that come under this frame to make it ride easier. I don't know whether I [fol. 95] can make myself clear to you or not; here is the engine resting on this center casting, this frame is all sitting on this center casting, No. 6, on this frame like that; then the springs are located underneath the engine truck frame. Let me get this clear in my head; you see, here is the boxes, taking a side view of this thing, here is the box, here is the axle, here is the engine truck, the box goes here, now there is an equalizer rests on top of this box, on the top of this box; then underneath here there is a spring that rests under

this engine truck frame; there is a spring hanger that goes from here to this equalizer, there is a pin located in here and a thing here that holds it, in other words keeps this frame up off of this box, and makes the engine ride better; the weight of the engine is carried on this spring, the equalizer rests on the top of the engine truck box. Mark that spring No. 7; the spring is what holds the weight of the engine up; and the spring where it attaches to this equalizer rests on top of the engine truck box; and the engine truck boxes are on top of the engine truck brass, that does rest on the axles; either the box or the brass rests on the axle. In other words, the axle holds the engine up. When those front trucks are derailed, supposing both of them are derailed, as to how much distance they fall on our main line track between here and Atlanta, the height of the rail, as to how much distance they fall, I couldn't answer that; the roadway people will have to give you that; I couldn't give you any accurate idea on it. We have hundred pound rails, but I don't know the height of them; I never measured one of them, I don't know the height of them. Whatever the height of that rail is, when those trucks get off, that wheel would drop to the tie or the ballast, one or the other. Just from general observation, I would say the ballast is usually up to about the level of the ties. As to the effect on that front part of an engine when that [fol. 96] truck gets off the track, the effect on this truck as regards its connection with the engine, the effect on those chains, and the effect on this center casting, I would answer that by saying that the engine truck disengages from the engine and throws the weight on the driving wheels, and there is no weight on the engine truck at all, it is loose.

As to how many inches this center casting penetrates, it varies on different class engines; on this particular class of engine it is probably three inches. If the truck dropped five inches, that center casting would drop out; and then the only thing that would hold the truck would be those chains in the front. They are attached only to the front end of the truck. I couldn't give you the dimensions on that truck. The engine truck carries the weight of the engine. It is not the length from one axle to the other, the truck frame is longer than that; but it is at least that long and longer. When those chains are holding up the front end of the truck, if that center piece is disengaged,

the back end of the truck will just drag along on the ties. As to how much play there is in those two chains at the front end of those trucks, when the wheels are on the track, in other words, if I should tighten it, as to how much I would take up, I couldn't answer that, because it will vary on different type engines. On this type of engine we set them to meet the track conditions; we have track conditions on some parts of the line that require a longer length than others; it is what we term under the Interstate Commerce Commission requirements, the proper dimensions, a safe and suitable length to afford proper clearance. I can't state how many inches it was. There is a rule of the Interstate Commerce Commission, but they don't specify the length; that only means that it should be reasonable. It depends entirely on the track conditions, curvature, etc. If those front wheels should become derailed, [fol. 97] as to whether they would hold it right up, hold the wheels up to the same level they were at before the derailment, would depend on the length of them. My experience has been that the chains are put on there to hold the engine truck on the ties in case of derailment; so as to keep the truck from becoming a foreign body and getting under the belly of the engine; it is intended for that, and also to keep it from leaving the cross-ties. We have a device on that engine known as Wright's Little Watchman. I couldn't answer how long we have been using that device on those Southern Railway passenger trains. They were not using them when I came to the road. I have been master mechanic sixteen years. I couldn't answer how long they have been using this Wright's Little Watchman; I don't think ten years; any statement I made would not be accurate. The best recollection I have of it probably is five or six or seven years. I couldn't answer as to the other divisions, but we use it on our division here, on the majority of the engines. This engine was equipped with it. As to the construction of that Wright's Little Watchman, I have got a print of it here. This is the watchman right there (indicating), this is the frame that fastens to the engine truck, this is the pin that works right in here. Mark this first drawing I have given you No. 8, and the second one No. 9; this first drawing represents, where I have got it marked "Trigger", the object that is called our Little Watchman. The trigger extends to the front

end of the engine; they can be placed in both ways, there may be some of them equipped both ways, but the majority of them are equipped with the trigger—let's see, I am not sure; it don't make any difference how they are placed; we may have some placed both ways. I believe, I am not absolutely sure, but probably this one was setting back toward the train; really that feature of it don't make a bit of difference. This trigger can either set back towards [fol. 98] the train or set from the engine towards the cow-catcher. The framework of this body does not rest on the cow-catcher or pilot of the engine; it is fastened to some part of the frame of the engine. This is the valve in here, that is just the trigger part, that is part of the trigger. That trigger, if it is moved up or down or to either side, or in any other direction a certain distance, that opens the valve and permits the air from the train line to go into the atmosphere. The train line is coupled to the Wright's Little Watchman, the train line was, rather. This place here up there to the train line is where the air from the train line contacts with the Little Watchman. There is a certain pressure of air in that line; we carry 100 pounds train line pressure and is pumped up from the locomotive. As to the pounds used in giving a service application of air to the train, the engineer braking, he can make the service application on most any pressure he wants to; usually they make—well, they vary; some engineers draw off six or eight or ten pounds of air. Our gauge shows how much we are drawing. If you want to make an emergency application it takes more than twenty pounds. I couldn't answer how many pounds it would take. When this trigger is moved sufficiently to attempt to open the air line, as to whether it makes a service application or an emergency application depends on the distance that the pin is moved on the front; the violence of the opening. To make this clear to you, there is a slot right here, and when that pin is moved enough, that will come back in here, it has just got a leverage to fit, it depends on how much this valve is pulled up from the seat; it is possible to make a service application with this thing, but if it is a straight drop, it opens that valve wide enough so that this thing comes back in here and locks, and the only way you can shut it off is to operate this thing down here; it is possible for it to [fol. 99] make a service application, and possible to make

an emergency application; if it is violent enough and extreme enough, it will make an emergency application. This trigger, if it moves up at the back end of it, that enters here and pushes that valve off the seat, and back in this corner here and admits the air from the train line to go to the atmosphere, and the effect of that is to put the brakes on the train; that is the way you apply the brakes. If this back end of this trigger is moved violently enough it will open the valve wide enough to let enough air out of the train line into the atmosphere to make a very violent and an emergency application. As to who it is that controls the setting of the frame around this trigger that it comes in contact with, if this device is cut off, and as to who it is that designs the distance from the trigger that those lines like Figure No. 9 sets—well, I will tell you, that is at an experimental stage; we never have determined the exact distance for any of them. It depends on the curvature of the track; in other words, we have some conditions in the yard that are very much different from what they are on the main line, and we have to set them to suit the worst conditions we have, and it is in an experimental stage, that feature of it. A curve can set this watchman; we have some of them set. The only effect when it is set is to stop the train. We have had a number of cases; I don't know exactly how many we have had, we didn't keep any record of them; sometimes the engineers, of they set, never say anything about it, get down and pull them back and go ahead. There is no way you can disconnect this watchman with any valve or wheel or apparatus about the engine out on the line of road. It could be done; it is possible. They would have to disconnect the union in this pipe line that carries the air to the watchman and plug it up; a man could do it all right. I don't recall any valve or lever there back of this pipe line that could cut [fol. 100] it off before it gets there. We had one case that I recall where the front trucks derailed and this watchman operated several years ago; I didn't see that, I was just told; I was told it operated, I didn't see it. We might have a record of the times it has operated in the office, I wouldn't say; that is the only case I know of personally. There were no others reported to me where it operated, by engineers or anybody else. As to there being any way to keep it from operating if the framework comes in contact with

the trigger, from the construction of the valve, it would appear that it would have to work. It would operate, of course, to set the brakes. I went to this wreck after the engine turned over and looked at it. The engine was not set up when I got there, it was still laying on its side. The front trucks were torn up, but not entirely disconnected, there were laying right underneath the engine, as I recall; the safety chain was still hooked up and everything, it was just laying there like it turned over. The safety chains had not broken, but the casting was disconnected.

Q. When the engine turned over, that separated the male part from the female part?

A. Laid out like that.

This trip bracket I have marked in No. 9, that is attached to the truck frame of the engine, and this Wright's Little Watchman is attached to the frame work of the engine somewhere; they are all put on the front end. The pin can be operated either way, either in front or behind. Here is the trip bracket. I made a statement there that it was approximately five inches up and down this way, vertically, and approximately eighteen inches from side to side. That trigger is set in the center of it; it is located in the center of the bracket there. If the bracket is five inches, it would be half that distance before it came in contact with it. That trigger, as well as I recall, is approximately 5/8 or 3/4 inches in diameter; take that from five inches, that would leave [fol. 101] 4 1/4 inches, and the frame work would only have to fall about 2 and 1/8 inches to hit that trigger; approximately that, as well as I recall, these flanges are approximately 5/8 of an inch; they may be a little more than that. I don't know how much play that chain has, how much they would allow the wheels to drop below the top of the flange; I don't recall that. I don't know the height of the rail, but, supposing the height of the rail and the tie plate under it is 5 1/2 inches, and the trucks got off the track so as to make a mark on the ties, that truck frame would have to fall off the rail from 3 to 4 inches. This thing here, that is the flange. As to how far down on the inside of the rail it projects down here, the government requires one inch; it depends on the wear of the wheel; some of them will be

longer than that. A new flange is one inch long; so that if the rail is 5 inches high, and that wheel gets off the rail, and that point of the flange hits the cross-tie and holds it up, that frame will have dropped 4 inches, the flange being an inch high; you take that inch from the 5 inches of the rail, and your frame would drop 4 inches; taking it for granted that the height of the rail and the tie-plate together is 5 inches, that would make that drop 4 inches. Now, take a side swipe, you might call it, on those trucks; if the trucks got off the rail and got on the inside from 6 to 12 inches from the rail, and there are points on the same, I mean on the cross-tie where it would be from 6 to 12 inches from the rail on the inside and 6 to 12 inches on the outside, if I understand what you mean; if it moved 6 inches, it would be 6 inches off the center line either way. We have 18 inches lateral play there on account of the curvature. We give much less play up and down vertically, that is only 5 inches, because if the truck drops, we want that to affect the trigger either way almost instantly if the truck gets off. [fol. 102] The man that got it up intended to put it on there to stop the engine, instead of the brakes, in case of a derailment; in case the first front truck got off. It only applies to the front truck, and the object was to apply the brake on the engine just as soon as the front truck got off; we have some engines that have some of them on the tanks; I don't know whether we have got any of those here, or not. I wouldn't say it often happens that the front truck comes off; we have some cases, I won't say it is very often. The most vulnerable point on the engine in running on a road with a good many curves is not necessarily the front trucks; we have had cases where the front drivers would get off. I couldn't say which gets off oftener, the front trucks or the drivers; but this particular appliance is for the front trucks, because it is attached to them. I did not test this watchman after I took it off; I understand that Mr. Stewart, the superintendent of motive power, had it tested; I don't know it; I know they told me they did test it, that is all I know about that part of it. When I got there, the truck, as I say, was all laying over there; the truck part of it was all disconnected from the watchman part of it, from the trigger part; naturally, it would be. The trigger part of it, and the air pipe to the train line, had been taken off; Mr. Stewart had it taken off. It had

been taken off when I got there; he had it taken off for the purpose, I understood, of having it tested. I don't know how long it was after the wreck that I got there; we were called there right immediately after it happened, and we left here within forty minutes I would say, forty minutes to an hour from the time the derailment occurred, we left. Of course, you don't make very good time with a derrick, about 25 miles an hour; I don't recall now just the time we arrived there. I walked down there, but I don't remember a negro church. I saw the place down there where it looked like wheel marks on the rails and the place plowed [fol. 103] up there. I couldn't answer how far that was from where the final wreck and turning over of the engine occurred; I don't recall; it is between half a mile and a mile. I don't remember so much about a reverse curve with two curves in there. I couldn't answer what degree curve it was where I first saw these marks. The marks that I saw were right where it got off, were on the tie-plates and on the ties, too. You could track the marks off and on, not on every tie, but on a number of ties; you could see them pretty well all the way up from where I first saw that mark up to the place of the final derailment. I remember the mark on the outside pretty well, I am not so sure about the mark on the inside; there probably was. There was no doubt about that being the mark of the flange. The furtherest mark from the inside of the rail that I noticed of the flange from where the point of derailment began, from the inside of the rail to the outer edge of the cross-ties, was, I would say, around six inches, I don't know, probably a little more, but I couldn't say exactly. The marks on the outside of the other rail would have to be the same. I saw where the wheel finally struck that switch going out to the right where the engine turned over; I saw the marks all the way up to that, where it was finally derailed, but I don't recall so very much about them. You have got the wrong man if you want to examine me about this derailment; I thought I was going to tell you about the watchman. This plat marked No. 10 might represent a general view of the track from the point of the first derailment up to the final derailment on that switch of the east passing track; this is the only part that I recall here; where the derailment occurred is on this curve up here; I don't recall this part in here. I don't recall a sort of reverse curve there. We

don't know whether this watchman worked on this occasion or not. We don't know whether it stopped the train. [fol. 104] We don't know whether it put the brake on; we couldn't tell about any indication that the brake had been put on. If the brake had been put on in emergency down at this point of the first derailment, and if the train was running say 40 to 45 miles an hour, about the average speed along there, as to within what distance the emergency brake would have stopped that train, you will have to get an air brake expert to answer that question; I couldn't answer it. I wouldn't consider I am enough of an expert to answer that. I never have run on trains. I fired on an engine a little bit; but I wouldn't consider myself a trained man. I have applied brakes, but I never applied them to see about the distance. I wouldn't say I could stop that train easily in 150 or 200 yards; I wouldn't say one way or the other; I don't know about that; the practical men that operate the brakes are the men that could tell that; experienced men that run on engines, engineers and firemen. If this trigger had been set, this Little Watchman could have been locked after the wreck and it couldn't have been; if it goes over far enough, it is supposed to lock; as I said awhile ago, that is what it is for, to pull it down. If it goes just far enough to make an emergency application and stops the train, as to whether it rights itself again then, or has to be pulled back, that depends on how much that trigger moves up and down. I couldn't answer how much it would have to move before it would lock it, because, as I said at the start, they are in the experimental stage, and they vary. The wheels could not have dropped any further than the ties or the ballast, and they had to drop that far to make marks on the ties; so the chain had at least enough play in it to let them down that much. As to whether the chain could have held up the front wheels and let the back wheels down depends on the length or the chains. The chains were attached to the front corners of the truck. Whenever those front corners drop, that would bring that frame closer to [fol. 105] the trigger of the watchman. Whenever the wheels dropped, they pulled down the truck frame and pulled down this little trip bracket that sets on the frame; and the question of springing the trigger depends on how far the truck frame drops, if it has a drop; that is the principle of it; and on the side view, it depends on how far

it shifts to one side. You could have made the trip bracket much smaller than that, but I don't know whether it would work or not; you could make it any distance you want it; it is a question of whether it would set the watchman or not; that is what I said awhile ago in the beginning, that feature of it is still in the experimental stage; in other words, you can take an engine on the Birmingham Division and set it one place, and run it from here to Chattanooga it would have to be set on another, and if you run it from here to Meridian, it would have to be set on another; it depends on the kind of track you have got; whether you have got sharp curves on it or not. This particular engine has run on this division only for the last six or seven years, I know. I don't know the rules as to the elevation of the rails, etc. I have never had any personal experience with objects on the track derailing the front trucks of an engine; I have heard of cases. As to how close the pilot sets to the rails, it varies; the government requirements are a minimum of 3 inches and a maximum of 6 inches, anywhere inside of that. I couldn't say about this engine; I couldn't answer that intelligently, because I did not look at it; you see the engine was turned over, it would just be a guess. The government requirement is between 3 and 6 inches. I just looked at the flanges of these front trucks in a general way. They appeared to be in good condition. I don't recall seeing any marks of anything on them; of course, they were down there in the mud, and you couldn't tell much about them. I couldn't see the wheel. I don't remember seeing any marks on them of any sort, because the wheels was buried in the mud.

[fol. 106] Cross-examination:

I am the master mechanic of the Birmingham Division of the Southern Railway, and I have the A. G. S. Division, and the Northern Alabama also, and the A. G. A., and in that connection I only have supervision of the rolling stock, locomotives, cars and shop force; and I have supervision in the shops of the repair work on the engines, cars, etc. I have nothing whatever to do with the maintenance of the roadway, and nothing whatever to do with the transportation or the designation of the curves or anything of that short. My job keeps me pretty closely confined to the shops at Birmingham. I do not personally make inspections of the en-

gines on each trip; I have inspectors for that purpose. When anything is reported out of order with an engine, it is simply brought to the shops for repairs; and my job is in seeing that those repairs are made, general supervision; giving directions in a general way. This Wright's Little Watchman is just in an experimental stage. That experiment has been going on with engines on this division of the Southern Railway, within my knowledge, for five or six or seven years. As yet, it has never been demonstrated to be a perfect appliance in the operations; and its operation depends on the roadway conditions, the curvature of the track, the height of the track and everything of that kind; and you have to adjust the framework and the trigger in such a way that it will not block the wheels of the train in the practical operation of the train; and to do that, you have to adjust it for the most extreme conditions that you have to meet in the operation of that engine; and I might say that we have had some delays to trains on account of this device setting; and that would then involve the necessity of increasing the size of the framework; and also we have had some trip brackets, we have had some of the trip brackets to set at different heights on the same class engine; in other words, we couldn't make them exactly the [fol. 107] same thing; we have set them the same thing and had them to set the brakes in emergency on the line of road. This trip bracket is the same thing we have been referring to here as the framework of the part. It varies on different class engines; I know of one particular instance that we set the bracket the same distance as another engine of the same class, and it set the brakes in emergency on the line of road. We applied them ourselves; they have to be put on entirely. At times it wouldn't set using the same engine.

Redirect examination:

This same engine has never jumped the track before, that I know of; I don't know about that. We have not been using them on all the engines for five or six or seven years; we have been putting them on gradually. We have had some of them at least five or six or seven years. I don't know of a single passenger engine between here and Atlanta that hasn't got one of them; as I said in the beginning there, five or six or seven years; I meant we had been applying a number of them gradually, gradually increasing

them. We quit for a while, and then we started to putting them in again, and have been increasing since.

THOMAS H. DAVIS, called as a witness in behalf of the plaintiff, first being duly sworn, testified by deposition as follows:

Direct examination:

I am in the employment of the Southern Railway as passenger conductor. On the 14th of February, 1933, I was running on a passenger train which was carrying passengers and mail and express from Birmingham, Alabama into Atlanta, Georgia. I was conductor on the train. I recall a negro church and burial ground about a mile west of Bremen that we passed there on the track. As we passed that negro church, the speed we were going on this day was [fol. 108] right around forty-five miles an hour. I remember hearing the engineer blow the station signal; he blew it about that church, right somewhere close to it. That is about a mile from Bremen, approximately a mile. I did not notice anything wrong in any way whatever at that time. As to where we were when I first noticed any derailment, or any putting on of the brakes, or anything unusual, as to how close to Bremen we were, that passing track is about twice the length of the passing track, it will hold about thirty-two or three cars, about sixty-five car lengths, I imagine, from the station. We were about that first right-hand switch going into Bremen, coming this way, when the engine jumped the track. When the engine jumpad the track I was standing on the platform of the first-class coach. The engine jumped the track about a quarter of a mile from Bremen; it finally turned over about that place. I did not afterwards look at the marks where the front trucks first got off the track, I just went to the rear of the train. I didn't know of any trouble at all until just about the time the engine turned over. Just about that time, I don't know that I felt the air brake go on; the car was bumping and jumping, and riding so rough, that I was on, riding so rough, that I didn't feel the brakes. I knew something was wrong by the car jumping. Between the negro church, that was about three-quarters of a mile west, and this place that

I noticed the car was on the ties, the brakes had not been put on at all, so far as I could notice or tell, either a service or emergency application; neither one had been put on up to the time it got off the rails and I felt the bumping; I didn't feel any brakes. I didn't know there was anything wrong all that time. I did not know that the front wheels of the front truck got off about that negro church; I didn't know there was anything wrong until just about the time of the wreck. About the time of the wreck and the engine [fol. 109] turning over, it was running just about the same speed, about forty-five miles an hour; that was about the usual speed. He hadn't begun to slow up for the station at that time. He usually began to slow up for the station when we got nearly the length of that passing track, the east end of it, he began to slow up. As to how close that was to the station at Bremen, it was about thirty car lengths, freight car lengths. A freight car will average forty feet. He would begin to slow up about thirty car lengths from it; they would begin to brake right at the east end of that passing track; something like three hundred yards, thirty cars forty feet long.

Cross-examination:

Mr. Cox was just what we term an extra man; he runs all the runs; the regular man has to lose two trips, I believe it is, a month, and he comes in and runs all the runs, takes it time about just like he had a regular run, but he runs all the runs; he just shifts about from one run to the other; my regular man had to lose that trip, and he come out in his place. Mr. Cox did make that run, though, at regular intervals, and at times, of course, he would catch these other runs. As to how long prior to the day of this accident was the last time he had been over it, had made that run, I can't say, because I didn't see him. If he works regularly, he comes out of Birmingham a train ahead every time, he just comes up one trip, leaving Birmingham this morning which would have been on that train; if he wasn't working regularly, the next trip when he goes out, he would go out on a train ahead of it, at 11:55 at night. We had the same engine that usually pulled that train, regardless of the engineer that was pulling it. Before leaving Birmingham I checked up on the brakes and all of my train; I saw that they were all fully operating. When the accident occurred I did not

go back to make any investigation as to what caused the [fol. 110] derailment myself. The first thing I did was to go up to the engine. My train on that day consisted of Engine 1483, and a baggage and mail car; then a combination baggage and coach followed it, then the first class coach was next, the Pullman next, and the dining car next, and a coach on the rear for extra travel that day. We had an engine and tender and six cars. We had not experienced any trouble of any kind in the handling of that train from Birmingham up to that point, or at any other point; everything running usually and normally.

Redirect examination:

I went up to the engine. I didn't see the engineer, but in about less than about a minute after I got to the engine, I saw the fireman climbing over the tender. I couldn't tell that the engineer was dead when I got up there; I didn't see him. It fell over on his side, on the right side; it kind of turned down in elbow shape.

E. Dowdle, called as a witness in behalf of the plaintiff, first being duly sworn, testified by deposition as follows:

Direct examination:

I work jointly for the Southern Railway Company and Southeastern Express. I was both baggageman and expressman. I run on passenger trains. On the 14th day of February, 1933, I ran on a Southern train that was carrying passengers and express and baggage from Birmingham, Alabama, into Atlanta, Georgia. The number of that train was 40. I don't remember a negro church and burial ground about a mile before you get into Bremen, nor have I ever seen it, nor have I ever noticed it. I did not notice anything wrong about this train as we approached Bremen, up to the time it got off the track, up to the time my car got off the track; that was the first I knew that anything was wrong. That was at that right hand switch, going into Bremen. Where it all got off the track, and where the en- [fol. 111] gine turned over, as to how close that was to the depot, I wouldn't—I won't say, I wouldn't say exactly, because I didn't get out of the car for some time. Whenever

my car got off the track was the point of derailment. I felt my car on the ties. Up to that time I did not know anything was wrong at all. My first feeling or knowledge as to anything being wrong was just the car jumping and jerking like, and, of course, the freight began to move, the express and baggage in the car. When my car got off the rails was the first I knew anything was wrong; and that was just a little after the time the engine turned over. I imagine it ran on the ties after getting off about eighty yards; I think there was anyway, there was about, as well as I remember, about this eighty yards of the train off, that is, the engine and tender and three coaches, I think. It ran about eight yards jumping the ties, that is, I won't say my car ran that distance, for I don't know about that, but there was about that much of the train off the track, as well as I remember. Up to the time my car got off the track and began to bump the ties I did not know anything was wrong at all. I did not feel any brakes put on up to that time. I did not feel the air brake put on after my car began to bump. I didn't even feel the air put on then. I didn't know anything was wrong until the train stopped, it was all so quick. If any brakes were put on, I didn't feel them at all; I didn't hear the air escape, or anything. All I heard was my car bumping along on the cross-ties; it seems to me like, I won't say, the body of the car just settled on the ground; there was a little shake there, it all hapened so quick, I wouldn't—at the time that this occurred, I wouldn't say we were running about forty-five miles an hour. It was just about the usual speed.

[fol. 112] Cross-examination:

My car was the one right behind the engine and tender. It was not turned over, it settled on the body; the trucks just went down, buried in the ground. My duties between stations are entirely within the car. I am pretty well engaged all the time, so that I don't have much time to observe conditions along the line of road; and, therefore, I had never even noticed this negro church down there. I am not familiar with the location of the switches and things of that sort. I knew nothing about the condition of the track, and things of that kind; my duties are altogether inside of the car; and when my car left the track and went off, my freight and baggage just began to slide all over that car.

I was injured to some extent myself; just slight bruises; and my duties required me, of course, to stay there and guard and protect that property. I came over to Atlanta on 26; I had to stay there—I had some money and stuff like that, and I couldn't leave the car. My duties required me to stay right there with the property that was in my charge until I was relieved so that I could get away.

CHARLEY LEE LOWE (colored), called as a witness in behalf of the defendant, first being duly sworn, testified as follows:

Direct examination:

I am 9 years old, will be 10 next September. I went to school four weeks before Christmas. I can't read or write much. I live down yonder in Lennie Dobb's house, right down below the Baptist church, that little colored Baptist church down there. That colored Baptist church stands pretty close to the railroad. I remember the day along about last February some time when the train turned over down there just below Bremen, between Bremen and that Baptist church. I was out there that day. On that day, before that train come up, I put a rock on there and was [fol. 113] standing there until it busted and I went on when it passed there. I put it right down in front of the Baptist church on top of the rail. After I put it up there I went out there in the road. The train ran over it and busted up the rock, then went on up the track. I didn't see nothing happen to it; I just saw it pass on up the track. I saw it after it turned over. I went on up there where it turned over afterward. Later on in the day Mr. Swint and the Sheriff and others came over to my house and talked to me. I went back to the Baptist church with them and showed them where I put that rock, and showed them where I got the rock. It was a red rock as big as your fist. It was a rock that looked something like that (indicating). It wasn't as big as that, it was half as big; it was as big as right across there (indicating with rock).

Cross-examination:

It was about as big as a man's fist. Nobody told me to say that; nobody has told me to say anything. It was

about half as big as that rock; if you burst that rock in two it was about half that size. It was a red rock. It looked more like that (indicating), more like the little rock. It was one of the kind of rocks that you could crush; and it was one of the kind of rocks that would make stuff like that (indicating). I never had put any more than that on there; that was the first time I had ever done it. I hadn't been putting them on there and seeing them crush, that was the first time I ever did that. I just put one rock on there, put it on top of the rail, set it up there. The rock wasn't as high as this rock, just half as big as that rock; it was not that high, but it was just one rock. The train was coming along and I put it on there. I heard the train coming. It was not in sight when I did it, it was not quite in sight. That rock (indicating), the one I put there, was a little bit bigger than that one; it was half as big as that one (indicating); it was a little bigger than [fol. 114] those two rocks put together; a little bigger than both those put together; about one more bigger than both of those; put one more of that size and it would be about as big as that; just about one more in there. Here is another one, about that big; just about that size there now, that was the rock I put on that track. I put it there to see the train mash it. After the train passed I did not go to see whether it was mashed or not; I seen it when I was out there in the road; I saw it enough out of the road without going to it. From there I went home. I saw the train run up the track near Bremen; but until it got way up there it ran all right. Up to the time it turned over at that switch, I did not see anything wrong with it. I saw some of the wheels off. I did not see the front trucks off; I saw two wheels off; they were the two wheels in front; I saw those two truck wheels off. From the place where I noticed the trucks were off or any wheels off, the engine ran, after it hit the rock, before the wheels got off, about as far as from here to the wall; after it hit the rock, before the wheels got off. I did not see them when they got off; I saw them when they were off. I was not looking at the train all the time; I was looking at the rock. I saw the train. It went as far as from me to the wall over there before I saw the wheels off the track. I don't know whether they got off before that or not, that was when I noticed them. I was looking at the train all the time; I looked at just one place,

the back of the train. These people got hold of me about 12 o'clock. This train passed there about 10. It was two hours after that before they got to where I was. I did not live a mile from there, it was a quarter of a mile; it was in sight of that place. I went home, and about 12 o'clock these policemen came and got me; they just come down there and told me. I run and they measured my track; I run and they caught me. Mr. White, and I forget [fol. 115] the other's names, got hold of me. The others were just others, I have forgotten their names; police I think; two policemen I think. They told me what they arrested me for; they said for putting that rock on the track. They told me that before I told them anything. They got me for putting that rock on the track. I hadn't told them up to that time; I hadn't told my ma and hadn't told my pa; and these men came and got me and said they got me for putting the rock on the track and that was the first anybody had said about it. I never said nothing; I said I put it on there. They took me to the calaboose and kept me there until night and then brought me to Buchanan. They kept me thirty days and then they turned me loose; and I have been loose ever since. I haven't been putting any more rocks on tracks; I haven't put any more on the track since then. The rock I put was about as big as this pile; and I put it on there to see the train crush it.

It was agreed between counsel for the plaintiff and counsel for the defendant that statement of M. E. MADDEN, a witness for the defendant, might be submitted as evidence just as though it had been taken as depositions. The statement is as follows, to-wit:

STATE OF ALABAMA,
County of Jefferson:

Statement of M. E. Madden

I am now General Superintendent of the Southern Railway Company, with headquarters at Birmingham, Alabama, and have been for the past five years. Prior to that time I had seven years active experience as locomotive engineer, during which time I ran an engine between Birm-

ingham and Atlanta, Georgia. After that service, I was then Road Foreman of Engines two years, and had con-
[fol. 116] trol over engineers and firemen operating over various lines. After that service, I became Trainmaster for the Southern Railway Company at Selma, Alabama, and Macon, Georgia, serving in that capacity approximately twelve years. I then became Division Superintendent, with headquarters at various places for a period of approximately ten years, and then became General Superintendent, as above stated.

On February 14, 1933, I was advised of the derailment of the engine and several cars on the Southern Railway Company's lines, near Bremen, Georgia, in which derailment the engineer, James M. Cox, lost his life. Upon receipt of this information, I was at Birmingham, Alabama. and left for the scene of the accident, leaving there on Train No. 26 and arrived there (scene of the accident) about three-thirty P. M., in the afternoon. I immediately made an inspection of the track and the derailed engine. especially inspecting the track at point of derailment immediately in front of a small church, which stood near the track. At that point I observed fragments of a rock which had been crushed; the fragments being on each side of the rail and at a point a few feet east thereof, and towards Bremen, Ga., were the first indentations of the wheel flange on the ties. These indentations I traced from that point to point of derailment.

At the point of derailment, as hereinabove referred to, it was on a six-degree curve to the left. The right-hand rail was super-elevated six inches above the other rail. I saw this measurement made by employees of the Southern Railway Company and by Inspector of the Interstate Commerce Commission. In my opinion, based upon my experience as a railroad engineer and long railroad experience as an operating officer charged with the responsibility for proper maintenance of track, this was a proper and sufficient elevation to carry a train of the character derailed at a speed of sixty miles or more per hour with safety.

[fol. 117] At point of derailment, the rails sat on tie-plates and these plates are spiked to the tie. These plates have two openings on each side of rail and there is one spike

driven into the tie on each side of the rail. The other openings in the tie-plate are there to be used in the event of any wearing of the other openings. This method of spiking is used on all lines of the Southern Railway Company and is amply sufficient to hold the rail securely and steadily to ties at point of derailment. I recall one incident where spikes were pulled on outside of a three-degree curve on the line of the Alabama Great Southern Railroad, and two fast passenger trains passed over this track and the rail did not move or spread in any way. At point of derailment, and on each side thereof for a considerable distance where I made a personal inspection thereof, the ties were sound and the spikes were securely driven into the ties up to the head and were holding firmly. There was no looseness or vibration in the rail at point of derailment. In other words, I found the track at point of derailment and all in its immediate vicinity where I made personal inspection in first-class condition and as good as at any point on the Southern Railway Company lines, or on any other railroad with which I am familiar.

In this connection, I might state that this particular piece of track where derailment occurred was rebuilt in 1931, and 100-lb. rail placed on it with first-class ties, tie-plates, spikes, etc., incident to its construction. In my opinion there was nothing in the conditions of the track at point of derailment which could possibly have caused or contributed to a derailment of the engine. The foregoing examination of the track conditions were made on the afternoon of the day of the derailment and no changes were made in the track, and the train which I went to Bremen on passed over [fol. 118] this piece of track, as did all other trains. This derailment caused no damage to the track at point of derailment, and made no repairs of any kind necessary at that point.

On the same afternoon of the derailment, and again on the next day, in company with Inspector of the Interstate Commerce Commission, I made an inspection of this engine. Several other gentlemen were present. The measurements of the flanges of the front wheels of the truck of this engine were taken by these gentlemen and by the Inspector of the Interstate Commerce Commission, and were found to conform to the standards prescribed by the Interstate Commerce Commission. The undersigned did not make these

measurements, and did not make any memorandum thereof. In the same way all of the wheels of the locomotive were measured and found to meet the requirements. I can say from my own observation that there were no sharp or worn or out-of-condition flanges in any respect.

I also, at the same time, and in company of the above referred to gentlemen, including the Inspector of the Interstate Commerce Commission, inspected the safety chains attached to the front trucks and found them to be partially twisted, which in my opinion showed evidence of having occurred in the derailment. I am satisfied this twisting occurred in the derailment because of a rupture of the outer scale of the metal, which was a fresh rupture. They were, however, of the proper length for use on this locomotive and on the track on which this engine was running. The purpose of these safety chains is to prevent the truck from running off the end of a tie in the event of a derailment. Had the chains been longer to permit this truck to go off the end of the tie, the engine would have been derailed instantly, and possibly the entire train behind it. If these chains had been as much or more than eight inches longer than they were, the purpose of these chains would have been [fol. 119] defeated. On a curve the truck wheels would have gone over to the right and have made a derailment of the entire engine almost a certainty. In fact, in the opinion of the undersigned, any additional length to these chains would have created a dangerous situation in case of a derailment.

On this engine, above referred to was an attachment known as Wright's Little Watchman, and is not a device required by the Interstate Commerce Commission. It does not come on new engines, but is brought by the Southern Railway Company on the outside and applied by it. This device is not used generally by other railroads, and, so far as the undersigned is advised, is not used other than on Southern Railway Company's engines. The use of this device cannot possibly endanger the operation of the train. It is used in the hope that it may apply the brakes and stop the train in event of derailment of front trucks. My experience with this device is that it sometimes works and sometimes will not work, and that it cannot be relied upon with any degree of certainty.

I am now and have for many years been familiar with

the Southern Railway Company's line of railroad between Birmingham, Alabama, and Atlanta, Georgia. Between point of derailment and Birmingham, Alabama, are numerous curves of the same or greater degree of curvature than at the point of derailment.

This statement is made for use in the trial of the case of Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James M. Cox vs. Southern Railway Company, pending in the Superior Court of Haralson County, Georgia, this 14th day of January, 1934.

(Signed) M. E. Madden.

[fol. 120] Plaintiff introduced in evidence yearly statements stamped with the stamp of the Southern Railway Company for income tax return purposes, the same showing the yearly salary of the deceased to be as follows, to-wit: in 1928, $3610.50; in 1929, $3874.03; in 1930, $3887.73; in 1931, $3760.30; and in 1932, $3357.80.

It was agreed that the deceased's salary for 1933 was as follows, to-wit: January, first period, $163.96; January, second period, $102.60; and February 1st to day of his death, which was February 14th, 1933, $150.42.

Plaintiff introduced in evidence certified copy of temporary letters of administration, issued to the plaintiff, Mrs. Olivia Cox Lunsford, under date of March 29th, 1933, by Thomas H. Jeffries, Ordinary of Fulton County, Georgia, showing the plaintiff, Mrs. Olivia Cox Lunsford, to be the duly appointed Temporary Administratrix of the Estate of James Monroe Cox, Deceased.

Plaintiff introduced in evidence plat showing the tracks, etc., at the scene of the derailment, the same being attached to this brief of evidence as Exhibit "A", and made a part hereof.

Plaintiff introduced in evidence seventeen (17) pictures, as identified and testified to by the various witnesses, the same being attached to this brief of evidence as Exhibit "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "M", "N", "O", "P", "Q", and "R", and made a part hereof.

Plaintiff introduced in evidence the Carlisle Mortality Tables, contained in the 70th Georgia Reports, page 845, showing the life expectancy of the deceased to be 14.92 years, the evidence showing that he was 59 years of age at the time of his death.

[fol. 121] Plaintiff introduced in evidence the drawing of Wright's Little Watchman, the same being attached to this brief of evidence as Exhibit "S", and made a part hereof, together with a drawing of the trip bracket referred to, which said drawing is attached to this brief of evidence as Exhibit "S-A", and made a part hereof.

Plaintiff also introduced in evidence drawing of the track at the scene of the derailment, as drawn, identified and testified to by the witness, W. A. Goree, the same being attached to this brief of evidence as Exhibit "T", and made a part hereof.

Plaintiff also introduced in evidence drawing drawn by the witness, C. G. Goff, and identified and testified to by him, the same being attached to this brief of evidence as Exhibit "U", and made a part hereof.

No. 10

EXHIBIT "A"

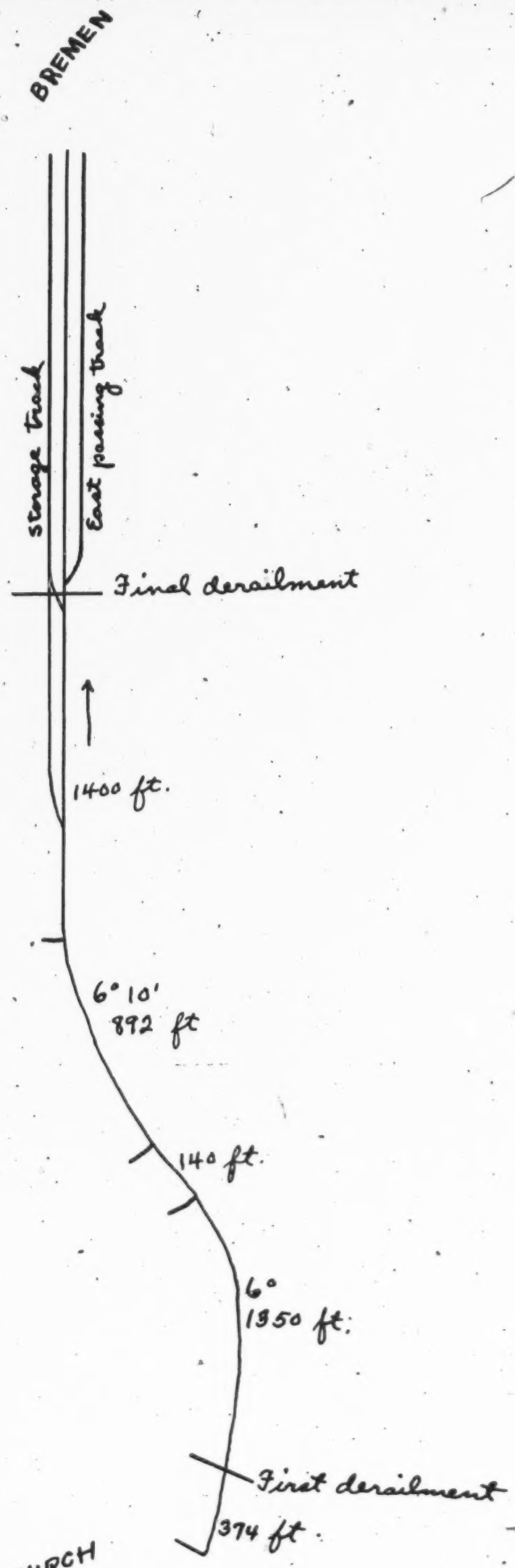


Exhibit "B"

This picture was taken 10 rail lengths west of the point of derailment looking east towards the point of derailment.

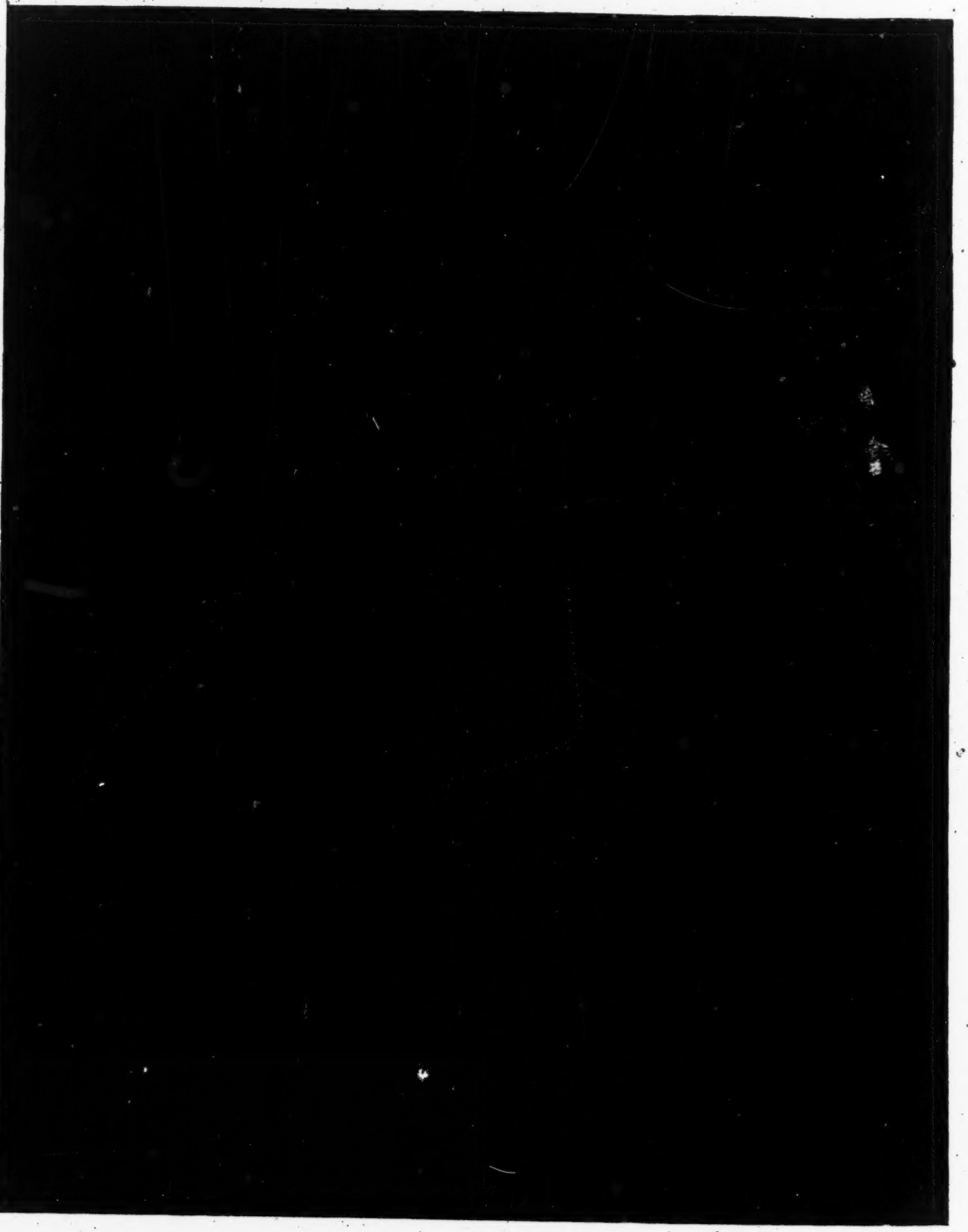


Exhibit "C"

This picture was taken 14 rail lengths west of the point of derailment looking east towards the point of derailment.

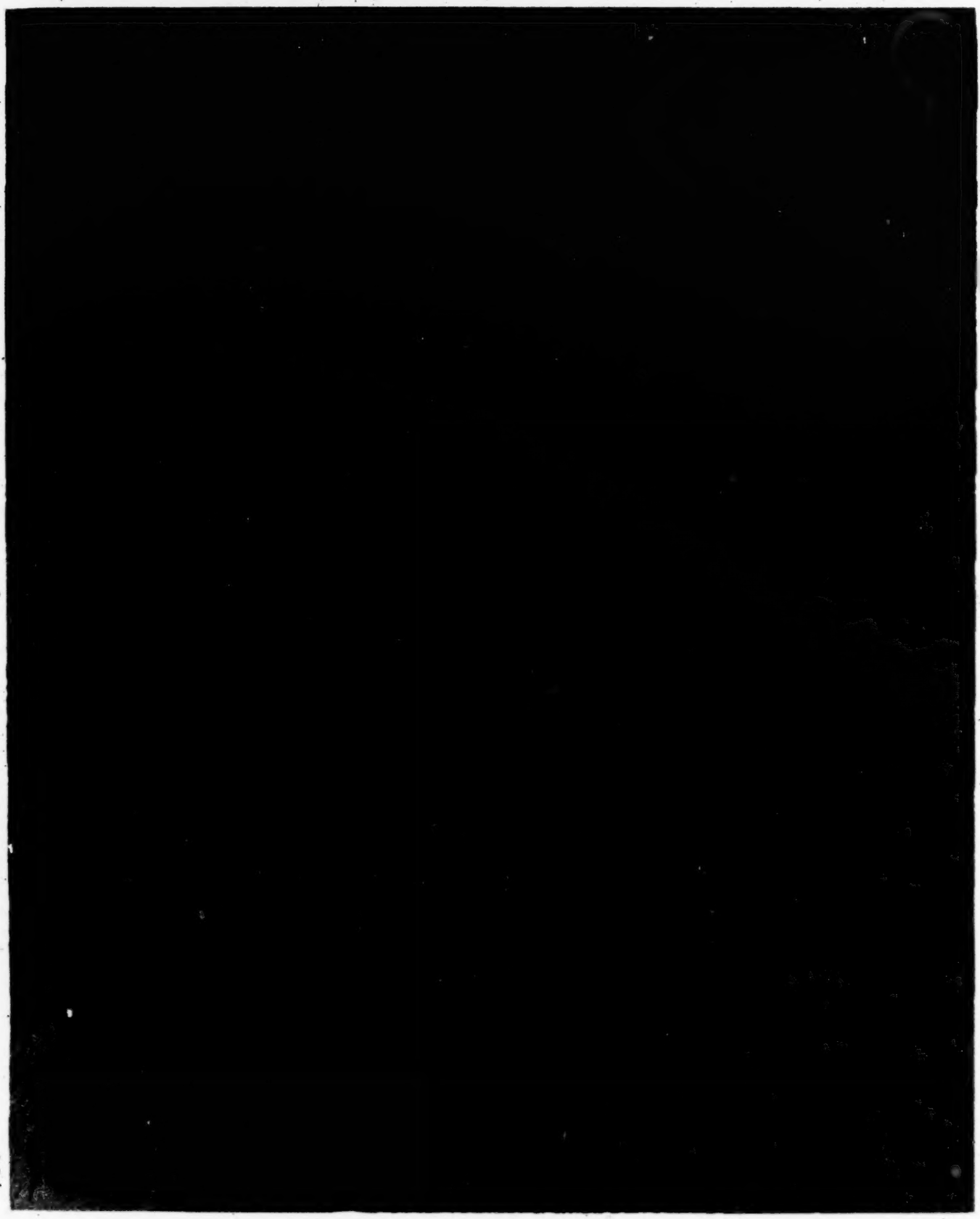
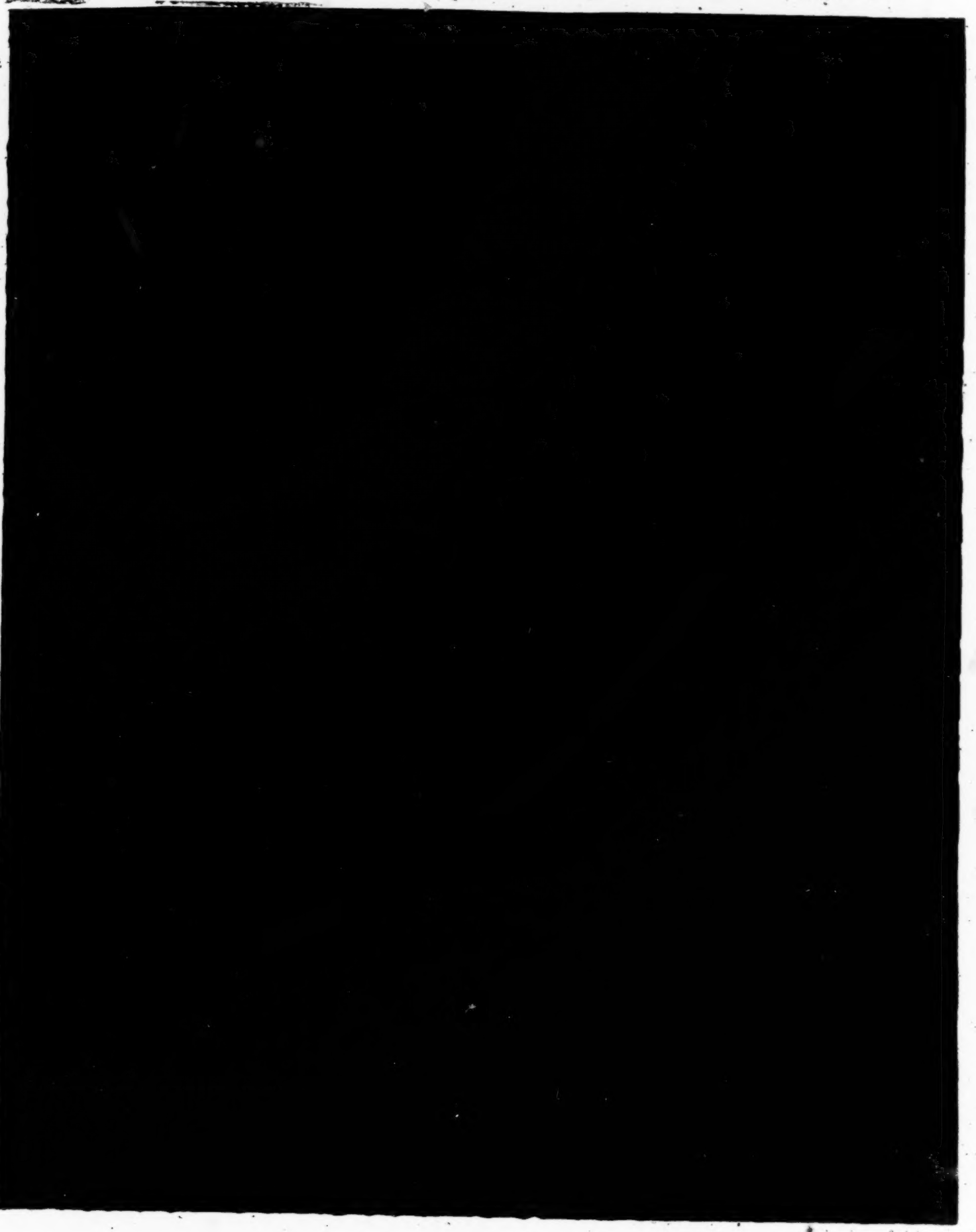


Exhibit "D"

This picture was taken about 15 feet west of the point of derailment just opposite the cemetery, the camera being 25 feet from Lunsford. This picture is to show the point of derailment, the ties there, the elevation of the outside rails, the marks of the derailed wheels on the ties.

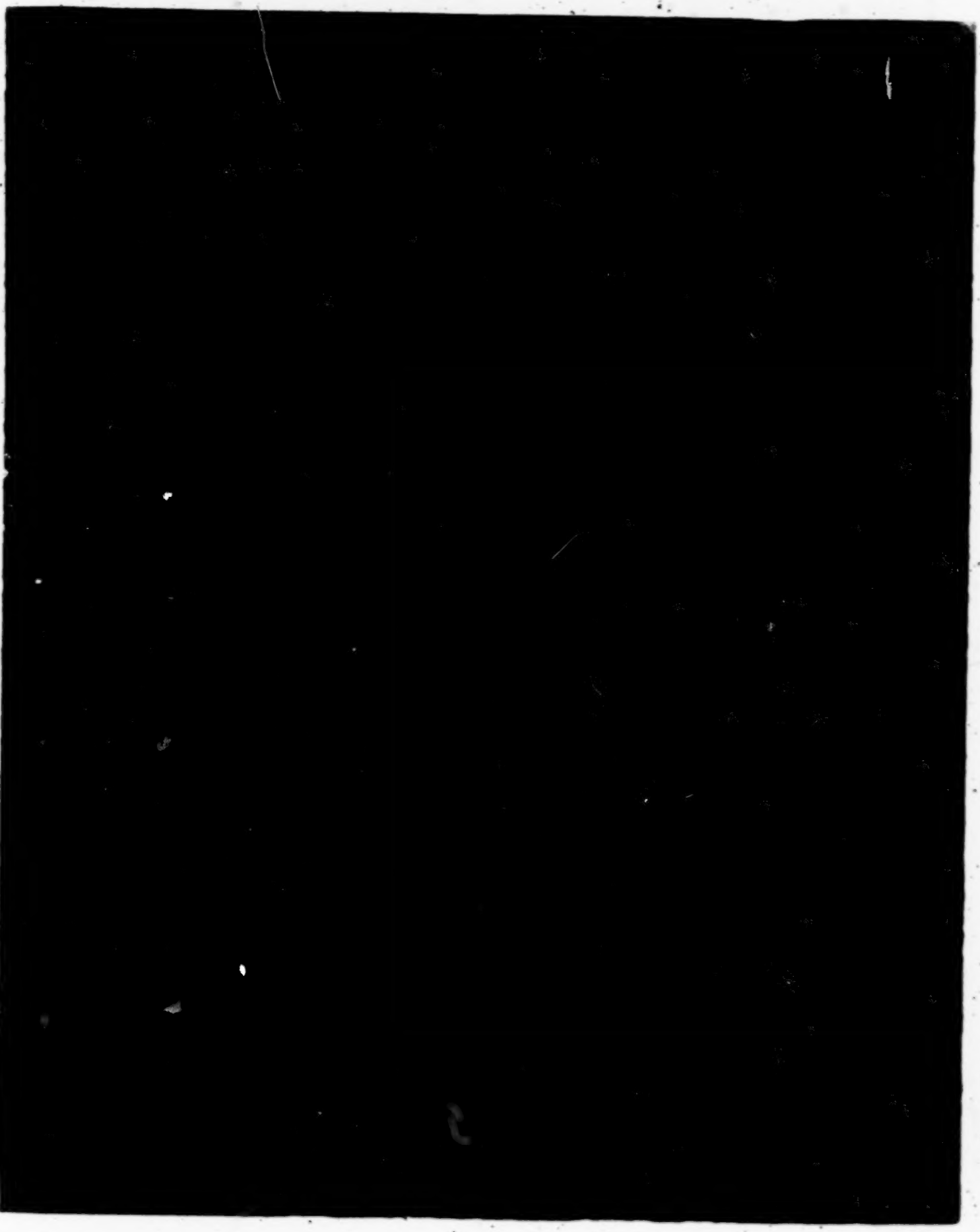


125

102

Exhibit "E"

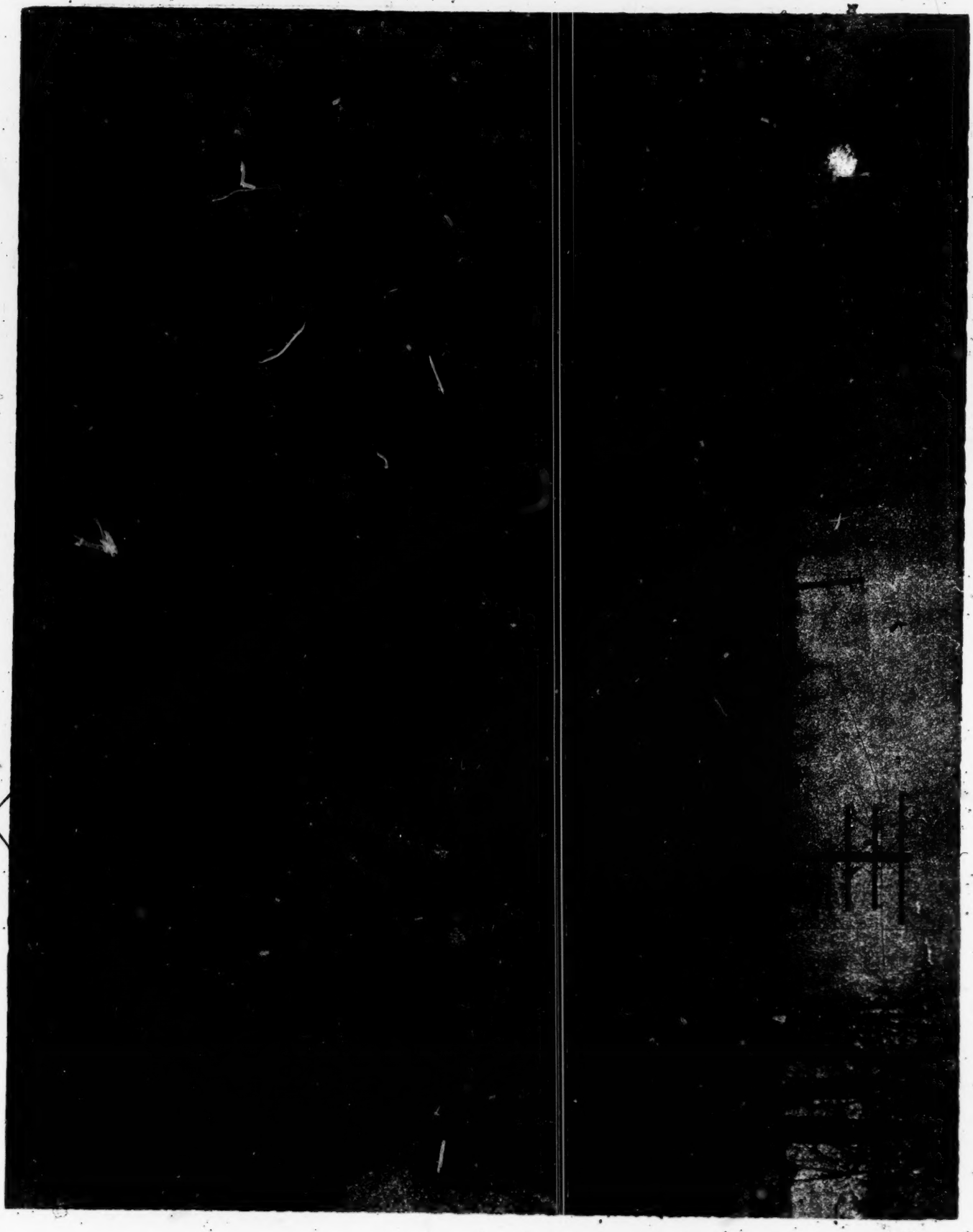
This picture is a close-up of the ties at the point of derailment. The camera was about 10 feet south of the south rail and the picture is intended to show 3 or 4 ties just west of the first wheel mark on the ties and to show the ties where the wheels left the track. The camera was on the south side of the track and the picture was taken looking north toward the graveyard.



126

Exhibit "F"

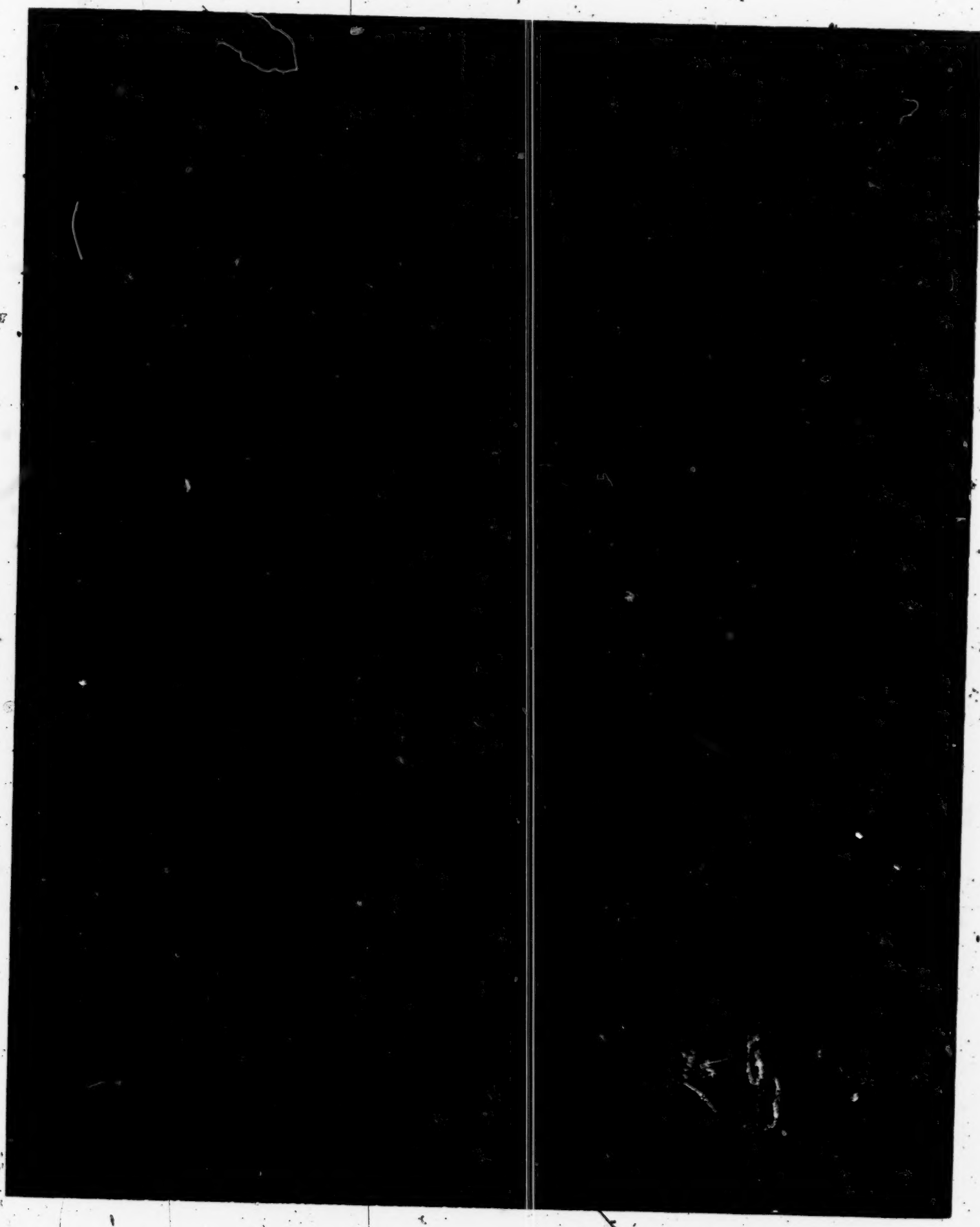
This picture was taken from a point about 20 feet east of the point of derailment looking west to show in the immediate foreground the wheel marks on the ties and to show as a whole the curvature of the tracks at this point.



127

Exhibit "G"

This picture was taken from a point about 30 feet east of the point of derailment and 15 feet looking east to show the nature and curvature of the track over which the train passed while the front trucks were off the track.



128

Exhibit "H"

This picture was taken from a point about 30 feet west of the right switch at which the engine began turning over looking east toward Bremen.

129

Exhibit "I"

This picture was taken from a point about 30 feet west of the point of the right switch and 10 feet south of the south rail looking north to show ties just west of the point of the right switch and about at the place where all the wheels left the track and the engine began to turn over.

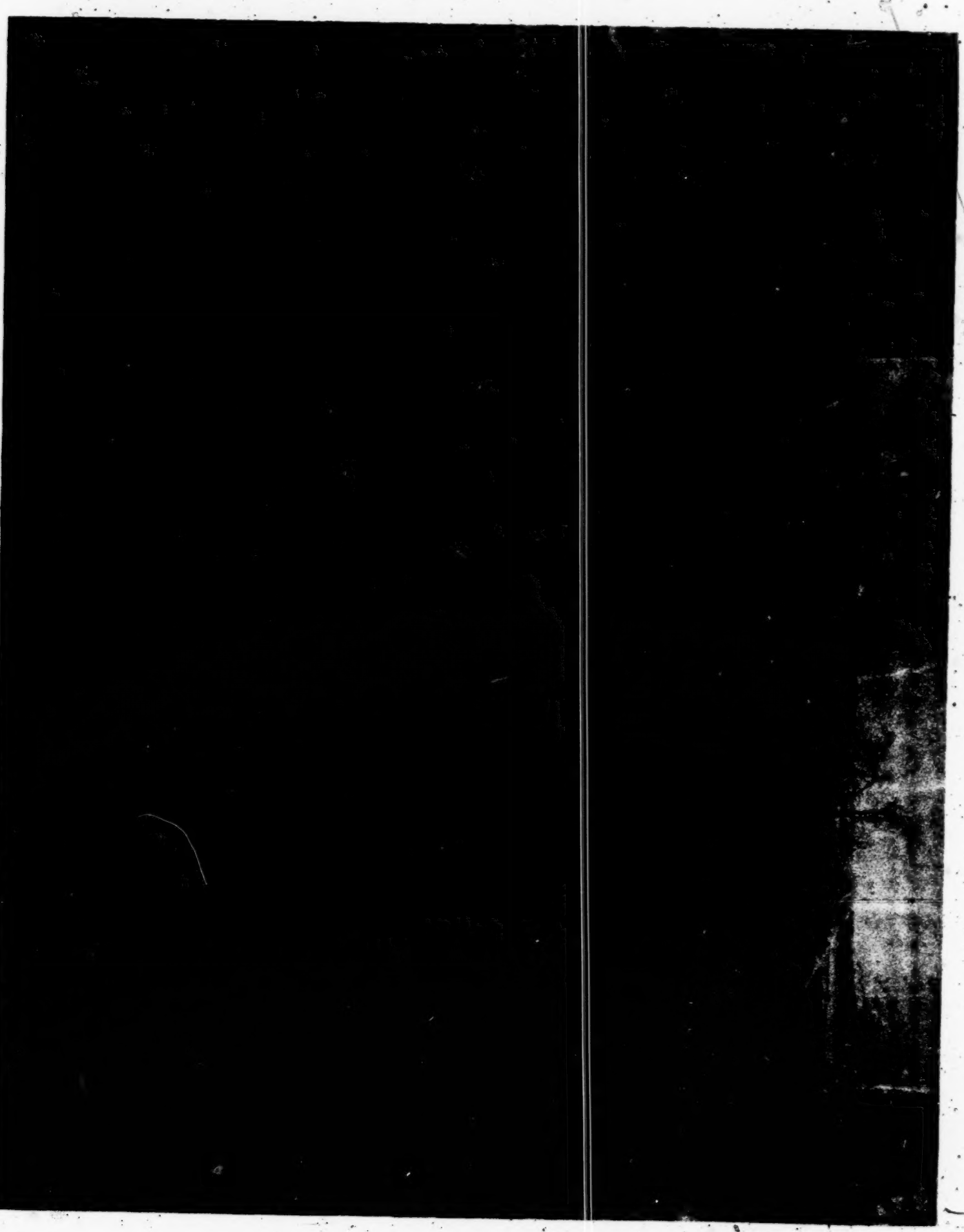


Exhibit "J"

Exhibit "K"

Close-up of watchman from left front side of green engine Atlanta division No. 1407 taken in North Avenue round house Southern Road January 9, 1934.

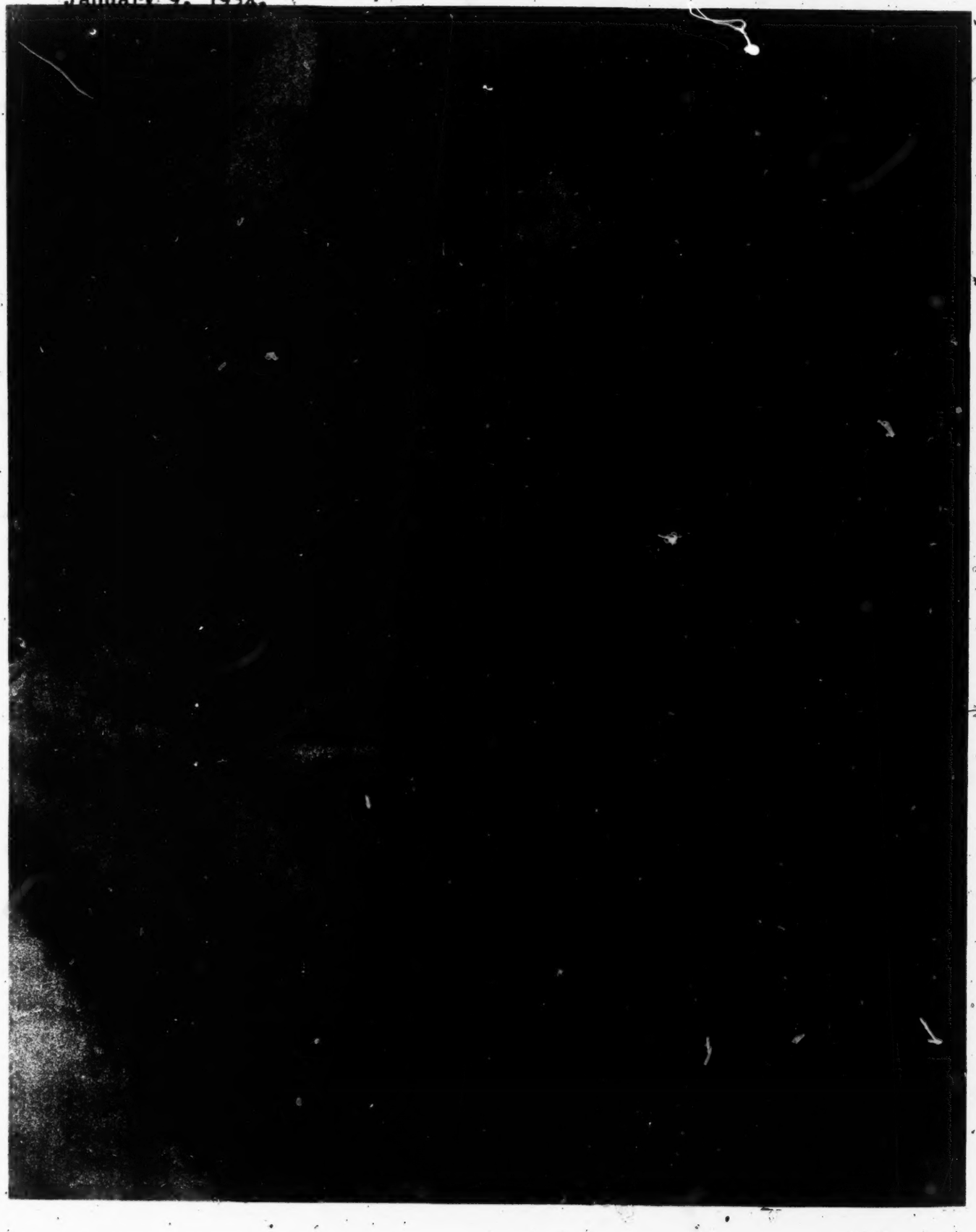


Exhibit "L"

Left front side of green engine Atlanta division No. 1407.

Exhibit "M"

Taken about 10 feet from left front side of green engine Atlanta division No. 1407.

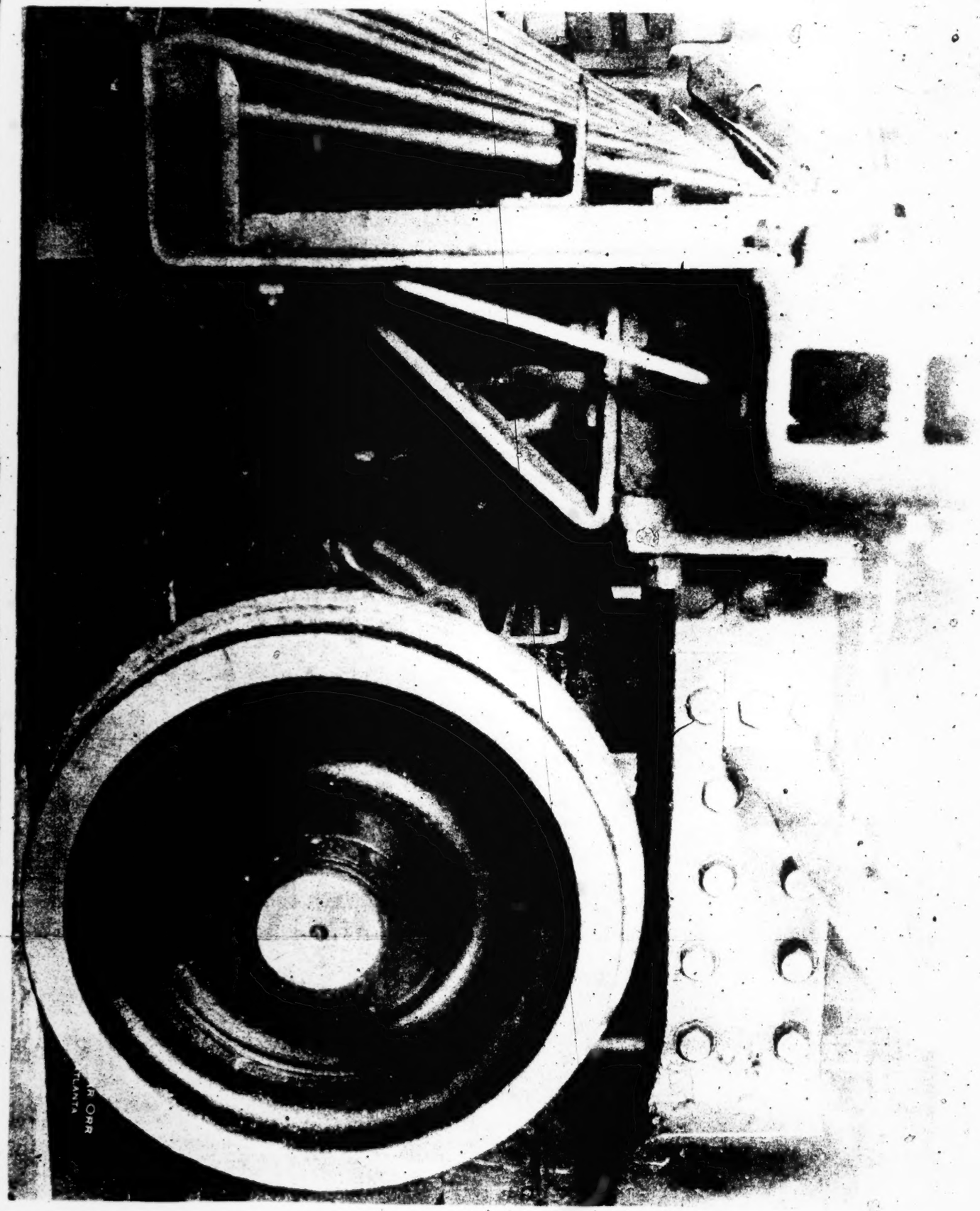
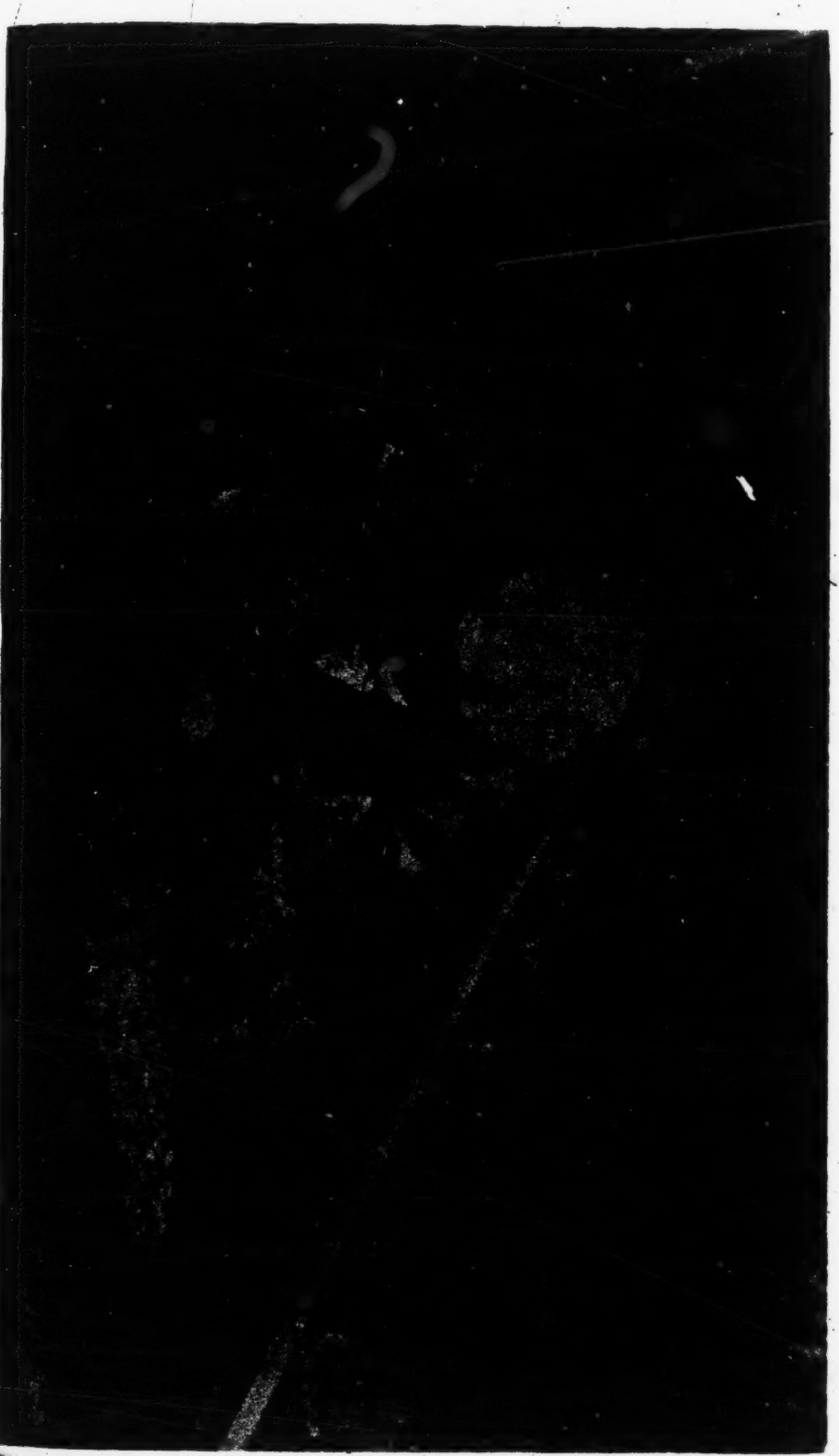


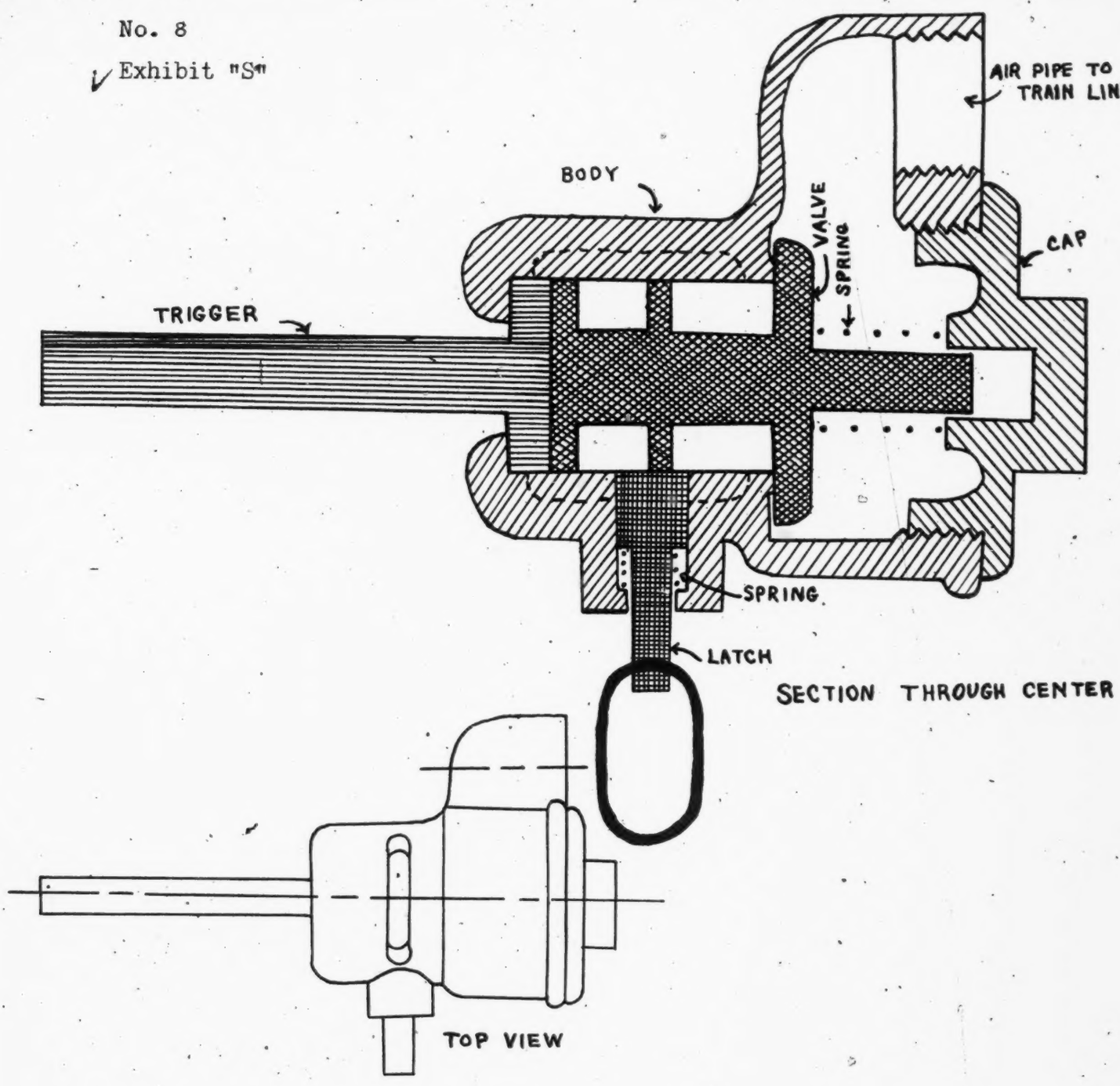
Exhibit "N"

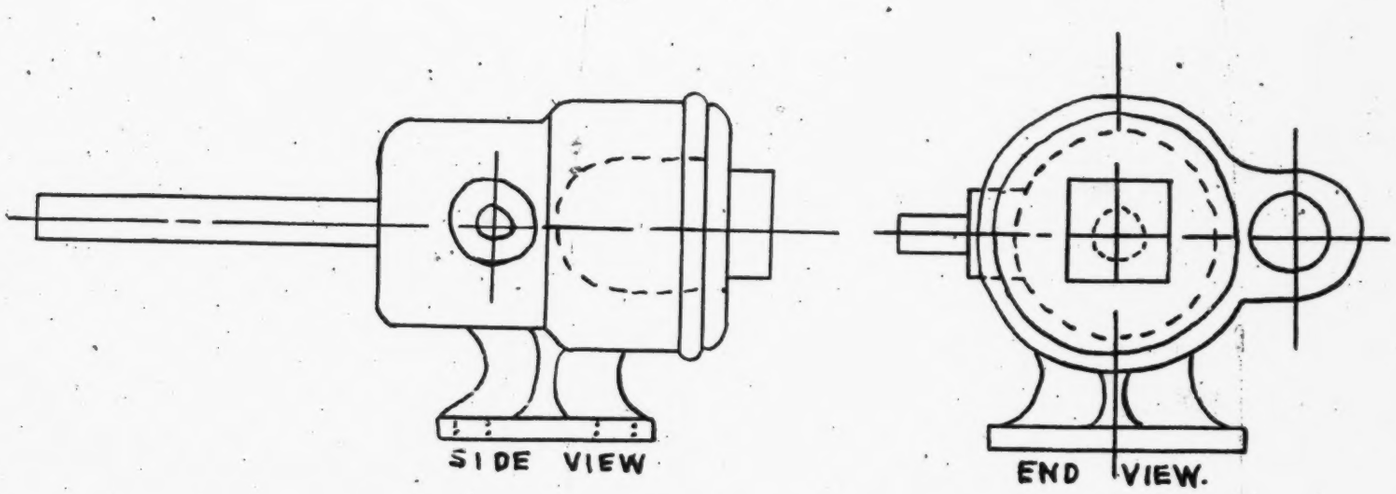
Taken about 10 feet from right front side of green engine No. 1263 Atlanta division.



No. 8

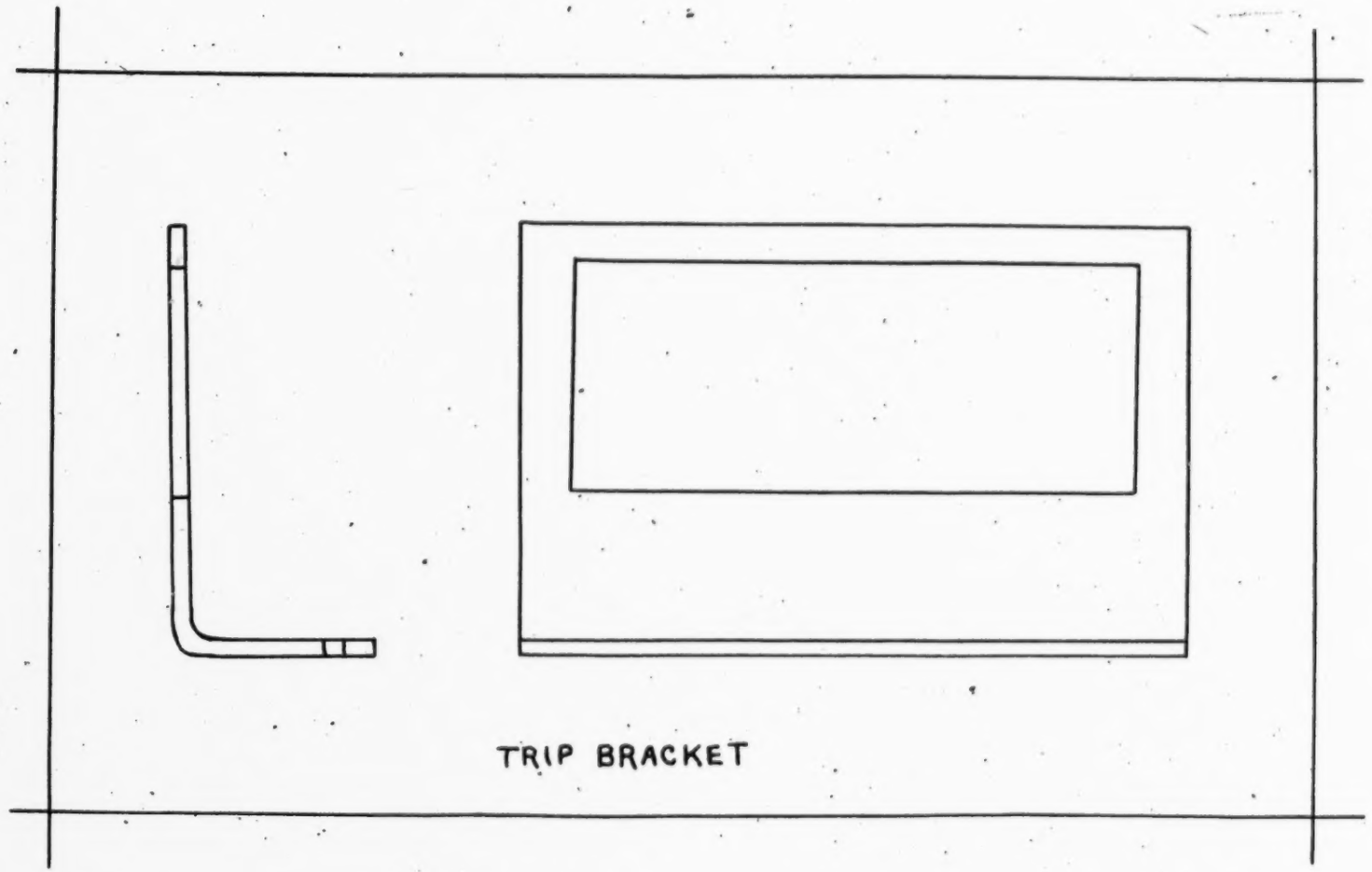
Exhibit "S"





WRIGHT'S LITTLE WATCHMAN.

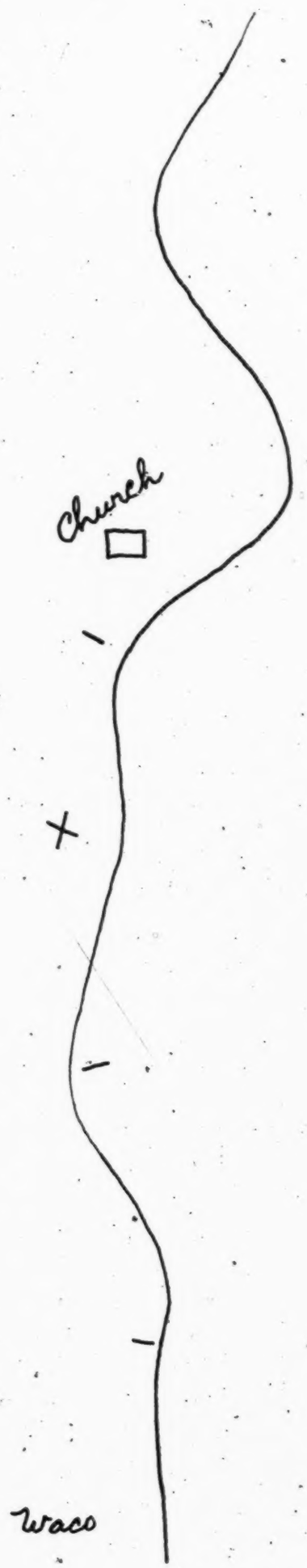
No. 9 Exhibit "S-A"



No. 11

Goree

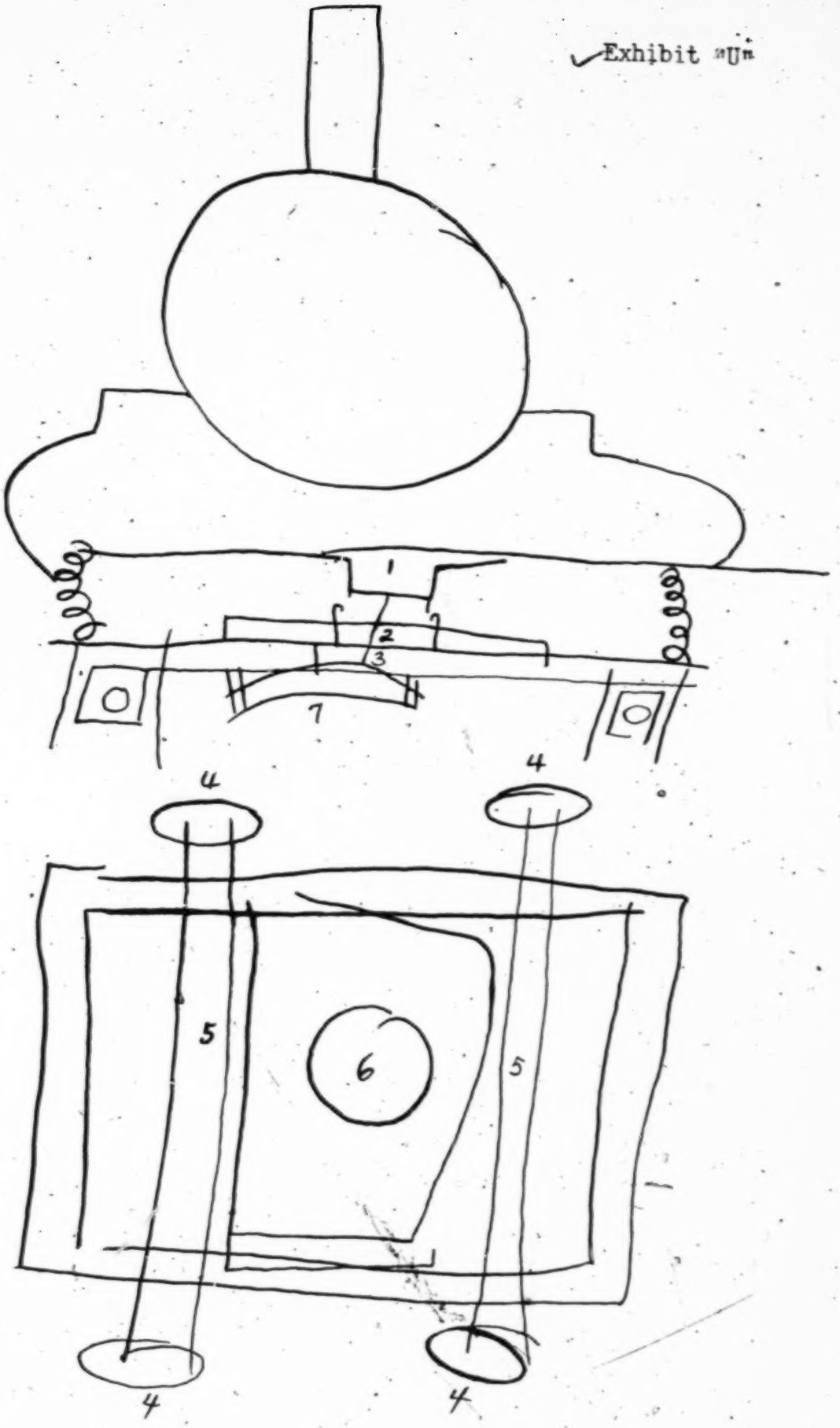
✓ Exhibit "T"



142

A

Exhibit "U"



143

[fol. 144] IN SUPERIOR COURT OF HARALSON COUNTY

ORDER APPROVING BRIEF OF EVIDENCE

I hereby certify that the above and foregoing constitutes a true and correct brief of the evidence delivered on the trial of the above stated case, to wit: Mrs. Olivia Cox Lunsford, Administratrix of the Estate of James Monroe Cox, Deceased, vs. Southern Railway Company, No. 2229, July Term, 1933, Haralson Superior Court, and the same is hereby approved as such and ordered filed as a part of the record in said case.

This the 5 day of April, 1934.

J. R. Hutcheson, Judge Superior Court of Haralson County, Georgia.

[File endorsement omitted.]

[fol. 145] IN SUPERIOR COURT OF HARALSON COUNTY

AMENDED MOTION FOR NEW TRIAL—Filed April 5, 1934

Now comes Southern Railway Company, defendant in the above stated case, and, by leave of court, amends its motion for new trial heretofore filed in said case, and, for grounds thereof, says:

1st. That on the trial of said case and in his charge to the jury therein, the trial judge, in presenting the contentions of the plaintiff in the first count of the petition, made the following statement, to-wit:

"The petition further alleges that the engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances and other apparatus under the body of said engine, extending from the back to the front thereof and consisting of cylinders, valves and other apparatus, including air, and which automatically, whenever said front wheels of said engine should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, to apply the air on the brakes of the entire train.

It is alleged that had said appliance known as a watchman been in repair, the movement of said train at said point would have been stopped in a couple of hundred yards, which would have been automatic and without any effort on the part of the engineer; that the defendant failed, before said engine left Birmingham, Alabama to properly inspect said watchman to see that the same was in condition to work; that the said watchman was not in working [fol. 146] or functioning order at the time of said derailment; that the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection; that had said watchman functioned, the train would have been stopped long before striking said right hand switch and the decedent's life would have been saved;"

and, further on, in stating to the jury the contentions of the plaintiff as set forth forth in the second count of the petition, made the following statement, to-wit:

"Then follows an allegation similar to that in the first count as to the engine being equipped with what is called a watchman, which, it is alleged, if it had functioned, would have stopped the engine long before striking the right hand switch and thus saved the life of the decedent;"

and, subsequent thereto, in outlining the contentions of the defendant as made in its answer to the petition, made the following statement, to-wit:

"Answering paragraph fifteen of the first count, the defendant says that the engine was equipped with an experimental device known as 'Wright's Little Watchman,' which was attached to certain apparatus connected with said engine and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train; that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause the tripping of said valve and the application of said brakes; that the same is merely an experimental device which will not operate at all times when said truck wheels leave the track but will operate only when conditions develop which will trip the same; that said device is not in use on all railroads and is not re-

quired to be used under the Safety Appliance Act of Con-
[fol. 147] gress or any regulations made in pursuance thereof, and that it was no part of the duty of the decedent to inspect the same. The defendant in answering paragraph ten of the second count makes the same answer as to the device known as the watchman as is made in response to paragraph fifteen of the first count;" and thereafter instructed the jury as follows, to-wit:

"The law under which this case is being tried is the Act of the United States Congress of 1908. So far as is applicable to this case, that act provides that every common carrier by railroad, while engaged in commerce between any of the several States of the Union, shall be liable in damages for the death of any employee in such commerce, such liability is to be to the employee's personal representative for the benefit of the surviving widow and children of such employee, such liability to be where death results, in whole or in part, from the negligence of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery or other equipment. This law further provides that in all actions brought against any such common carrier by railroad under any of the provisions of this Act to recover damages for the death of an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee;"

and, subsequent thereto, further instructed the jury as follows, towit:

"I will now instruct you upon the allegation contained [fol. 148] in paragraph 15 of the first count and paragraph 10 of the second count, the substance of which is that there was upon the engine an appliance known as a 'watchman', which consisted of cylinders, valves and other apparatus, including air, and which was under the body of the engine and extended from the back to the front end

thereof, and which automatically, whenever the front wheels of the engine should leave the track, was designed, by means of a valve which was tripped by the derailment of the wheels, to apply the brakes on the entire train, and that had this appliance been in repair and had this appliance functioned, the train would have stopped long before striking the right hand switch and would have saved the life of the decedent. The allegation is that this contrivance was not in working or functioning order at the time of the derailment, that the same failed to apply the brakes as was its design and purpose, and that had the "watchman" functioned, the train would have stopped long before striking the right hand switch.

"The court charges the jury that under the Act of Congress in force at the time of the alleged derailment in this case and death of the decedent, it was provided as follows: 'It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.' You are further instructed that the law to which the court has called your attention applies to the locomotive, its boiler, tender and [fol. 149] all parts and appurtenances thereof, and the court charges the jury that a contrivance built on the engine and attached to certain apparatus connected to the engine, and which was so designed that under certain conditions the derailment of the front wheels would trip a valve and thereby apply the air on the brakes of the train, is a part and appurtenance of the engine or locomotive; provided, gentlemen, you find the following to be true:

"The defendant contends that the device known as Wright's Little Watchman is really in an experimental stage, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and that therefore

it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence, (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as contended, was simply an experiment, and this limited or experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly.

"Now, on the other hand, I charge you that if this device, known as Wright's Little Watchman, had been in general use by the defendant, or by railroads in general, for such a length of time and in such general use that it became a fixed and permanent part of the locomotive, and that use was such as to hold out to the decedent, the engineer in this case, that it was a reliable device, that it could [fol. 150] be relied upon by him to function, and that any prudent man would have relied on this device under all the circumstances of the case, then the failure of this device to operate or to function, which failure was caused by and brought about by a failure to inspect the same and keep the same in proper working order, then and in that event such failure to operate or function would be negligence on the part of the defendant. If you find, gentlemen, that this device was used, as I say, so generally used for such length of time by the defendant that it became a part and appurtenance of the engine, and that the decedent was authorized to rely on it at this particular time by the conduct of the defendant in putting it on the engine and using it, under all the circumstances, then the following law would apply and this would be considered a part and appurtenance of the engine or locomotive at this particular time. I charge you that the duty put upon the defendant railway by the Act of Congress which the Court has called your attention to, to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to oper-

ate in the service to which the same was put, is an obsolute duty on the railway. It is not subject to any limitation or condition, is positive and not dependent, and unqualified by any consideration whatever. Now, gentlemen, if the defendant at that particular time put this device there for the purpose for which it was intended, it was the duty of the railroad company at this time to see that it was in proper working order, whether it was in an experimental stage or not. Failure to inspect it and see that it was in proper working order would be negligence, provided of course that the derailment of the locomotive was brought about by failure to have the "little watchman" in proper working order. These are questions for you. All questions of fact are for you. If you believe from the testimony that the defendant failed to have the part and [fol. 151] appurtenance of its locomotive, known as the watchman, in proper condition and safe to operate in the service to which the same was put, and if the same did fail to function and operate, and if its failure to so operate, because it was not maintained in good condition, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case. Of course, the circumstances at the time should be such as to cause a reasonably prudent man and a reasonably cautious man to have relied upon the "little watchman." I mean to say that if the circumstances were such as to hold out to Mr. Cox that this contrivance was there and was in proper working order, and it was not, then of course if the death was caused by the failure of this contrivance to work, if that was the cause of it, then of course the railroad company would be liable, provided of course that they did not inspect it and put it in proper working order at that particular time.

"If the jury believe from the evidence that the initial or first derailment at a distance of 1.35 miles from the depot at Bremen occurred from some cause other than the railway company's negligence, such as the placing of a rock on the track, still, if you believe from the evidence that this engine was equipped with a part and an appurtenance known as a watchman, which was designed to trip a valve when the front trucks should become derailed, and if you believe that had it been in proper condition and safe to operate in the service to which the same was

put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the train would have been stopped and [fol. 152] the decedent's life saved, then I charge you in that event the defendant would be liable in this case for damages to the plaintiff. This, gentlemen, is qualified under the charge I gave you a while ago on the question of whether or not the 'little watchman' had been in use so long and to such an extent by the railroad company that the engineer was authorized to expect it to operate and to rely upon its functioning, and was not simply put there as an experiment on this occasion and known to him as such or should have been known to any prudent man under all the circumstances.

"Now, gentlemen, the Employers Liability Act of 1908 provides that no employee who may be killed in the employment of a carrier engaged in interstate commerce, and who is himself engaged in such commerce, shall be held to have been guilty of contributory negligence in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the death of such employees. Therefore, I charge you that if Mr. Cox met his death because of the defendant's violation of the Safety Appliance Act of Congress which I have read to you, then I charge you that the defendant railway can neither claim that Mr. Cox assumed the risk of the result of such violation, nor would any contributory negligence of Mr. Cox be treated to reduce the damage, if the violation by the railway of this statute contributed to his death.

"If you find under the instructions given you, either on the first branch of this case as to the issues of negligence on the part of the railway company and on the part of the decedent, or on the second branch of the case as to alleged liability for failure to comply with the Safety Appliance Act, then you would go no further in your deliberations, but you would return a verdict for the defendant. If on the other hand you find for the plaintiff, it would be

your duty to assess the damages. Of course, in consider- [fol. 153] ing the question of damages, the jury will consider the rule which the court has previously given as to the effect of the decedent's negligence, if any, upon the amount of recovery, all of which I have charged you fully upon. The charge upon the measure of damages relates to the full amount of damages which are recoverable in a case of this kind, and you will bear in mind, as just stated, any reductions in that amount under the instructions hereinbefore given you, if you apply them to the measure of damages."

To each and all of the aforesaid instructions, the defendant, Southern Railway Company, excepts and assigns error thereon, and says that the court erred in so instructing the jury for the following reasons, to-wit:

(a) That said instructions with reference to the Safety Appliance Act of Congress, and the amendments thereto, and any alleged violation thereof, were wholly inapplicable and inappropriate, in that as movant contends there was no evidence showing or tending to show a violation thereof.

(b) That said instructions, especially so far as the same related to the Boiler Inspection Act of Congress (U. S. Code Annotated, Title 45, Section 23), and with reference to what is referred to as the "watchman", or "Wright's Little Watchman", were wholly inappropriate, inapplicable and in no way pertinent under the evidence in the case, and the trial judge erred in admitting to the jury any issue with respect thereto, or arising thereunder, for the reasons:

(1) That there was no evidence, as movant contends, showing or tending to show any violation of said Act, or any of the amendments thereto.

(2) That the device referred to as the "watchman", or "Wright's Little Watchman", is not an appliance or appurtenance prescribed by said Safety Appliance Act of [fol. 154] Congress, or said Boiler inspection Act of Congress, or any of the amendments thereto; that there was no evidence, as movant contends, showing or tending to show that it was an appliance or appurtenance prescribed in the rules and regulations of the Interstate Commerce Commission, made and provided under and in pursuance of said

acts, but, on the contrary, the undisputed evidence was that it was not an appliance or appurtenance prescribed for an engine under such rules and regulations of the Interstate Commerce Commission.

(3) That the undisputed evidence, as movant contends, showed that the use of the appliance or appurtenance known as the "watchman", or "Wright's Little Watchman", in no way imperiled the safety of the train or any person or employee thereon.

(4) That there was no evidence, as movant contends, showing or tending to show that the device referred to as the "watchman", or "Wright's Little Watchman", was in common or general use on railroads in this country, but, on the contrary, tended to show that it was not in such general use on railroads, but was only in use on some of the locomotives of the Southern Railway Company; that the undisputed evidence shows that it was an unperfected device in a mere experimental stage of development, uncertain in its operations, and could not be relied upon to operate in all cases.

In support of the foregoing, we call attention to the undisputed testimony, as movant contends, of Mr. M. E. Madden, the General Superintendent of the Southern Ry. Co., who testified to thirty-six years of active railroad experience, including seven (7) years as a locomotive engineer, two (2) years as Road Foreman of Engines, twelve (12) years as Trainmaster, ten (10) years as Division Superintendent, and five (5) years as General Superintendent of [fol. 155] the Company, the pertinent portion of his testimony being (brief of evidence, page 51), as follows:

"On this engine, above referred to was an attachment known as Wright's Little Watchman, and is not a device required by the Interstate Commerce Commission. It does not come on new engines, but is bought by the Southern Railway Company on the outside and applied by it. This devise is not used generally by other railroads, and, so far as the undersigned is advised, is not used other than on Southern Railway Company's engines. The use of this device cannot possibly endanger the operation of the train. It is used in the hope that it may apply the brakes and stop the train in event of derailment of front trucks. My ex-

perience with this device is that it sometimes works and sometimes will not work, and that it cannot be relied upon with any degree of certainty."

Also to the undisputed testimony of Mr. G. C. Goff, as movant contends Master Mechanic of the Southern Railway Company at Birmingham, Alabama, beginning at the bottom of page 34 of the brief of evidence, and extending through pages 35, 36, 37, 38, 39 and 40 thereof, describing the device and testifying that it was a mere experimental device, and in particular to the portion of his cross examination as follows, to-wit (see brief of evidence, pages 41 and 42):

"This Wright's Little Watchman is just in an experimental stage. That experiment has been going on with engines on this division of the Southern Railway, within my knowledge, for five or six or seven years. As yet, it has never been demonstrated to be a perfect appliance in the operations; and its operation depends on the roadway conditions, the curvature of the track, the height of the track and everything of that kind; and you have to adjust the framework and the trigger in such a way that it will not block the wheels of the train in the practical operation [fol. 156] of the train; and to do that, you have to adjust it for the most extreme conditions that you have to meet in the operation of that engine; and I might say that we have had some delay to trains on account of this device setting; and that would then involve the necessity of increasing the size of the framework; and also we have had some trip brackets, we have had some of the trip brackets to set at different heights on the same class engine, in other words, we couldn't make them exactly the same thing, we have set them the same thing and had them to set the brakes in emergency on the line of road. This trip bracket is the same thing we have been referring to here as the framework of the part. It varies on different class engines; I know of one particular instance that we set the bracket the same distance as another engine of the same class, and it set the brakes in emergency on the line of road. We applied them ourselves, they have to be put on entirely. At times it wouldn't set using the same engine."

2nd. That on the trial of said case and in his charge to

the jury, the trial judge instructed the jury as follows, to-wit:

"The court charges the jury that under the Act of Congress in force at the time of the alleged derailment in this case and death of the decedent, it was provided as follows: 'It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the actual service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand [fol. 157] such test or tests as may be prescribed in the rules and regulations hereinafter provided for.' You are further instructed that the law to which the court has called your attention applies to the locomotive, its boiler, tender and all parts and appurtenances thereof."

To said charge of the court, the defendant, Southern Railway Company, excepts and assigns error thereon and says that the court erred in so instructing the jury for the following reasons, to-wit:

(a) That as movant contends under the evidence in this case the provisions of said Act of Congress as therein referred to were wholly inapplicable and in no way pertinent, in that there was no evidence showing or tending to show any violation thereof, defendant insisting that the device referred to in the pleadings and evidence as the "watchman", or "Wright's Little Watchman", is not an appliance or appurtenance prescribed by said Act, or in the rules and regulations of the Interstate Commerce Commission, made and provided under and in pursuance thereof, but, on the contrary, the undisputed evidence was that it was not an appliance or appurtenance prescribed for a locomotive under such rules and regulations of the Interstate Commerce Commission, and further contending that while there was an averment in plaintiff's petition as amended to the effect that the safety chains were too short, there was no evidence whatever in support thereof.

(b) That said instructions were highly prejudicial and harmful to the defendant, in that under the evidence in the case as movant contends the verdict rendered in favor of the plaintiff must necessarily have been based upon this inapplicable, impertinent act of Congress, and the alleged violation thereof by reason of the use of the device referred to as the "watchman", or "Wright's Little Watchman".

[fol. 158] 3rd. That on the trial of said case and in his charge to the jury, the trial judge instructed the jury as follows, to-wit:

"Now, on the other hand, I charge you that if this device, known as Wright's Little Watchman, had been in general use by the defendant, or by railroads in general, for such a length of time and in such general use that it became a fixed and permanent part of the locomotive, and that use was such as to hold out to the decedent, the engineer in this case, that it was a reliable device, that it could be relied upon by him to function, and that any prudent man would have relied on this device under all the circumstances of the case, then the failure of this device to operate or to function, which failure was caused by and brought about by a failure to inspect the same and keep the same in proper working order, then and in that event such failure to operate or function would be negligence on the part of the defendant. If you find, gentlemen, that this device was used, as I say, so generally used for such length of time by the defendant that it became a part and appurtenance of the engine, and that the decedent was authorized to rely on it at this particular time by the conduct of the defendant in putting it on the engine and using it, under all the circumstances, then the following law would apply and this would be considered a part and appurtenance of the engine or locomotive at this particular time. I charge you that the duty put upon the defendant railway by the Act of Congress which the court has called your attention to, to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to operate in the service to which the same are put, is an absolute duty on the railway. It is not subject to any limitation or condition, is positive and not dependent, and unqualified by any consideration whatever. Now, gentlemen, if the defendant at that particular [fol. 159] time put this device there for the purpose for

which it was intended, it was the duty of the railroad company at this time to see that it was in proper working order, whether it was in an experimental stage or not. Failure to inspect it and see that it was in proper working order would be negligence, provided of course that the derailment of the locomotive was brought about by failure to have the "little watchman" in proper working order."

To said charge of the court, the defendant Southern Railway Company, excepts and assigns error thereon, and says that the court erred in so instructing the jury for the following reasons, to-wit:

(a) That the provisions of the Act of Congress therein referred to, and said instructions applying the same to the use by defendant of the "watchman", or "Wright's Little Watchman", were wholly inapplicable and in no way pertinent under the evidence in the case, there being no evidence as movant contends showing or tending to show that it was an appliance or appurtenance prescribed under the rules and regulations of the Interstate Commerce Commission, under the Safety Appliance Act of Congress, or the Boiler Inspection Act of Congress, as referred to or prescribed in either of said Acts, or any of the amendments thereto.

(b) That under said Acts of Congress the failure of said watchman to operate would not be negligence as charged by the court, and no absolute duty devolved upon the defendant Railway Company to keep the same in proper condition and safe to operate in the service, under the evidence in the case, there being no evidence as movant contends that it was an appurtenance required by the Act of Congress referred to, or by any rule or regulation of the Interstate Commerce Commission, made under and in pursuance of the terms of said Act, and the undisputed evidence showing that it was not an appliance or appurtenance required by [fol. 160] such rules and regulations of the Interstate Commerce Commission.

(c) That the undisputed evidence as movant contends showed that the use of the appliance or appurtenance known as the watchman, or "Wright's Little Watchman" in no way imperiled the safety of the train or any person or employee thereon.

(d) That said charge of the court was not adjusted to and was wholly inapplicable under the evidence in the case, except as the same might be applied under the Safety Appliance Act of Congress, or the Boiler Inspection Act of Congress, there being no evidence as movant contends of any defect or insufficiency in the appliance known and referred to as the "watchman", or "Wright's Little Watchman", and the undisputed evidence being that it was a device not in general use on railroads, that it was an unperfected device in a mere experimental stage of development, uncertain in its operations, and not to be relied upon to operate in all cases.

4th. That on the trial of said case and in his charge to the jury, the trial judge instructed the jury as follows, to-wit:

"If the jury believe from the evidence that the initial or first derailment at a distance of 1.35 miles from the depot at Bremen occurred from some cause other than the railway company's negligence, such as the placing of a rock on the track, still, if you believe from the evidence that this engine was equipped with a part and an appurtenance known as a watchman, which was designed to trip a valve when the front trucks should become derailed, and if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped [fol. 161] by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the train would have been stopped and the decedent's life saved, then I charge you in that event the defendant would be liable in this case for damages to the plaintiff. This, gentlemen, is qualified under the charge I gave you a while ago on the question of whether or not the 'Little Watchman' had been in use so long and to such an extent by the railroad company that the engineer was authorized to expect it to operate and to rely upon its functioning, and was not simply put there as an experiment on this occasion and known to

him as such or should have been known to any prudent man under all the circumstances."

To said charge of the court, the defendant, Southern Railway Company, excepts and assigns error thereon, and says that the court erred in so instructing the jury, on the grounds:

(a) That said charge of the court was an application of the terms of the Boiler Inspection Act of Congress to this particular case, the defendant insisting that under the evidence the provisions of that Act were wholly inapplicable and in no way pertinent, the undisputed evidence showing that the watchman as therein referred to was not an appliance or appurtenance required under the rules and regulations of the Interstate Commerce Commission, made in pursuance and to carry into effect the provisions of the Safety Appliance Act of Congress, or the Boiler Inspection Act of Congress, or required under the terms of either of those Acts of Congress, or any of the amendments thereto.

(b) That said charge of the court was not adjusted to and was wholly inapplicable under the evidence in the case, except as the same might be applied under the Safety Ap- [fol. 162] pliance Act of Congress or the Boiler Inspection Act of Congress, there being no evidence as movant contends of any defect or insufficiency in the appliance known and referred to as the "watchman", or "Wright's Little Watchman", and the undisputed evidence being that it was a device not in general use on railroads, that it was an unperfected device in a mere experimental stage of development, uncertain in its operations, and not to be relied upon to operate in all cases.

Wherefore, the premises considered, movant, Southern Railway Company, prays that it be granted a new trial in said case.

Griffith & Matthews, Maddox, Matthews & Owens,
Attorneys for Movant, Southern Railway Company.

The above and foregoing amended motion for new trial in the above stated case, to-wit: Mrs. Olivia Cox Lunsford, Administratrix of Estate of James Monroe Cox v. Southern

Railway Company, is hereby allowed and ordered filed as a part of the record in said case, and the recitals of fact therein contained are certified to be true and correct.

This the 5th day of April, 1934.

J. R. Hutcheson, Judge of the Superior Court of Haralson County, Georgia.

[File endorsement omitted.]

[fol. 163] In Superior Court of Haralson County

Order of Court Overruling Motion for New Trial as Amended

Upon consideration of the within and foregoing motion for new trial it is ordered that the same be overruled upon each and every ground contained in original and amended motion for new trial, and a new trial denied.

This April 5, 1934.

J. R. Hutcheson, Judge S. C. T. C.

[fol. 164] In Superior Court of Haralson County

Charge of the Court—Filed April 5, 1934

Gentlemen of the jury, this is a suit brought by Mrs. Olivia Cox Lunsford as administratrix of the estate of James Monroe Cox, deceased, against the Southern Railway Company.

The suit is brought in two counts. In the first count it is alleged that on February 14, 1933, the decedent, James Monroe Cox, who will be hereinafter called the decedent, was employed by the defendant, the Southern Railway, as engineer on a passenger train. She alleges that on that day the decedent was driving a passenger train of the defendant from Birmingham, Alabama, to Atlanta, Georgia, and that the railway company and the deceased were both engaged in interstate commerce; that at about 10:30 o'clock in the morning, while decedent was so driving the engine, at a point approximately one and thirty-five hundredths of a mile west of Bremen, Georgia, in Haralson County, and

while rounding a sharp curve, the wheels of the front trucks under the engine left the rails but the engine, including all the drivers and other wheels thereof, remained on the track; that the engine continued to function apparently normally to the engineer and fireman, the front trucks being entirely out of view of them and there being nothing to put them on notice that they had left the rails, the construction of the engine being such by means of chains which suspended the trucks from the body of the engine, and other appliances, that the front trucks could be off the rails and the engine still continue to function without putting the engineer and fireman on notice that they were off the rails; that after the wheels of the trucks under the front end of the engine left the rails, the engine continued to run apparently normally, pulling the train a distance of seven-tenths of a mile until it reached a switch going to the right from the main line, at which point the said trucks with the front wheels attached thereto being off the track and dan- [fol. 165] gling by means of said chains and other appliances from the front end of the engine, struck said switch; that the effect of striking the switch was to throw the trucks and wheels to one side and under the engine and obstruct their further progress along the track and to cause the engine as a whole to leave the rails and to become unbalanced; that after running about one hundred yards in this condition the engine turned over and in so turning over, the steam and scalding water escaped from the same and the decedent was so crushed, mangled, bruised, scalded and burned that he died as a result of his injuries.

It is alleged that the defendant railway was negligent in the following particulars:

That the place of the initial derailment was around a very sharp curve, the track curving to the left in the direction the engine was going.

That the decedent was on the outside of the curve.

That the track did not have sufficient elevation on the right hand side to render it safe to propel an engine weighing in the neighborhood of two hundred tons, as did the engine in question.

That for an engine of that weight the elevation of the track was insufficient on the right hand side.

That at said initial point where the trucks got off the track the rails and track were not firm and secure, but on

the contrary the curve was very sharp, was insufficiently braced, and the rail sat on iron plates on ties which were insufficiently spiked.

That on the outside of said rails the plates had openings or holes for two spikes, which were necessary to give them a firm setting on the tie, whereas all of said plates had on the outside a spike in only one of said openings, which is alleged to have been negligence and which is alleged to have [fol. 166] made the track insecure and allowed the rails to yield to the pressure of a heavy train at said point, and which is alleged to have caused a certain amount of looseness and vibration in the rail and caused the same to give at the top and to have a tendency to give and thus enable the flange of the wheel to ride over the rail at said point.

That at said initial point of derailment the crossties were rotten and out of condition and failed to support firmly and securely the spikes driven through said plates to hold the rail in place.

That the rotten condition of said ties allowed the spikes to have play and room and the same were not tight, and allowed the right to vibrate and give, and allowed the flange of the wheel to climb over the side.

That on account of the constant vibration and rottenness of the ties at the time of the collision, the said spikes had worked up to a point above the flange of the rail and did not come in close and tight contact with the same so as to make the same secure.

That there was a space between the head of the spikes and the bottom flange of the rail which allowed play and vibration and looseness and insecurity in said rail.

That the insufficiency of the outer or bearing rail, due to all of these causes, caused the trucks to mount the rail, and the right hand wheel went off on the outside rail and the left wheel went off on the inside.

That the flanges of the front wheels of said engine were sharp and out of condition.

The petition further alleges that the engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances and other apparatus under the body of said engine, extending from the back to the front thereof and consisting of cylinders, valves [fol. 167] and other apparatus, including air, and which automatically, whenever said front wheels of said engine

should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, to apply the air on the brakes of the entire train. It is alleged that had said appliance known as a watchman been in repair, the movement of said train at said point would have been stopped in a couple of hundred yards, which would have been automatic and without any effort on the part of the engineer; that the defendant failed, before said engine left Birmingham, Alabama, to properly inspect said watchman to see that the same was in condition to work; that the said watchman was not in working or functioning order at the time of said derailment; that the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection; that had said watchman functioned, the train would have been stopped long before striking said right hand switch and the decedent's life would have been saved.

The petition further alleges that at a point about twenty-five or thirty-five feet west of the switch which turned to the right and at which point the engine finally left the track, the cross-ties were rotten and not securely ballasted, and that the spikes were almost out of the plates and the rail was not secure, all of which contributed to the final derailment after the engine had run said seven-tenths of a mile.

It is alleged that on account of each and all of the foregoing negligent acts and omissions of the defendant, and on account of each and all of the defective and insufficient conditions of the defendant's engines, appliances, machinery, track and roadbed, the derailment and turning over of the engine and consequent death of the decedent occurred.

The plaintiff brings this action under the Act of Congress [fol. 168] of April 22, 1908, and all subsequent amendments thereto regulating the liability of carriers engaged in interstate commerce to their employees.

It is alleged that the decedent was a widower; that he left surviving him two children: one, Mrs. Lunsford, and the other, Hubert A. Cox, who were his only surviving children; that the decedent's life was a value to the children; that he was fifty-nine years of age and had an expectancy in life of 14.92 years; that his earnings were about $325 per month and would have continued throughout his expectancy; that he contributed out of his earnings for the benefit of his two surviving children $200 per month, which

contributions would have kept up until his death, these contributions being in money, in services, in house rent, in contributions of property, groceries, automobiles, furniture, and in payment to employees for services rendered said two children. The plaintiff sues for fity thousand dollars damages.

Gentlemen, there is a second count in the petition. I have read you the first count, at least I have read you the substance of the first count, now I will proceed to define to you the substance of the second count. In the second count, instead of alleging the cause of the initial derailment which was 1.35 miles west of the station of Bremen, as I read to you in the first count, it is alleged that at said point 1.35 miles west of Bremen the front trucks of said engine struck a rock or other object negligently allowed by the defendant to be on the track and adjacent to the rails and that upon striking said rock the front trucks were derailed. It is alleged that the defendant was negligent in allowing the rock or other obstruction to be on the track at said time and place. It is alleged that the defendant's section hands were negligent in failing to properly inspect the track at said point, as the curve was very acute and dangerous and as [fol. 169] said rock or obstruction had remained on the track for upwards of one hour before said train passed in close proximity to said station at Bremen, Georgia; that the curve was to the left at said place and had been for three hundred yards; that the engineer was on the outside of the curve and had no opportunity to see the track any distance ahead of the engine; that the fireman on said engine was on the inside of the curve; that the engine was provided with an automatic stoker which fired the same by machinery and required only the turning of valves; that at the time of the initial derailment the fireman had no other duty to perform than to look out on his side of the engine and in the exercise of ordinary care should have looked out on his side of the engine, as that was the only side from which the track could be seen, it being on the inside of the curve; that the fireman, in the exercise of ordinary care, could and should have discovered said rock on the track and adjacent to said rail, and yet said fireman negligently failed to discover the same and failed to warn the engineer of said obstruction; that had the fireman discovered said rock and warned said engineer at a distance of one hundred or more yards away,

when he could have discovered said rock, as the same was then visible, the decedent would have been able to apply his brakes and stop the train before it finally left the track.

It is further alleged in the second count that after striking said rock the front trucks left the rails, but the engine was not derailed and continued to function apparently normally to the engineer and fireman for a distance of seven-tenths of a mile, at which point it struck a switch going out to the right from the track; that in so striking the switch the front trucks were turned to the right and were obstructed and caused to be thrust under the engine, and this, together with the large axles and wheels of said trucks and its general obstruction in turning to the right on striking said switch, threw the entire engine off the track and caused it [fol. 170] to turn over on its side after running about a hundred yards. Then follows an allegation similar to that in the first count as to the engine being equipped with what is called a watchman, which, it is alleged, if it had functioned, would have stopped the engine long before striking the right hand switch and thus saved the life of the decedent. Also in the second count is a similar allegation to the allegation in the first count to the effect that at a point about 25 or 30 feet west of the switch which turned to the right and at which point the engine began to turn over and finally did turn over, that the cross-ties were rotten and not securely ballasted, that the spikes were almost out of the plates and the rail was not secure, and it is alleged that all of these negligent acts and alleged defective condition of defendant's engines, appliances, machinery and cars, due to its negligence, contributed to and caused the turning over of said engine and death of the decedent. Then follows a similar allegation as to the value of the decedent's services and the alleged damages claimed.

The plaintiff has filed an amendment to the suit in which it is alleged that the safety chains attached to the front end of the truck on the engine which became derailed were too short by from eight to fifteen inches; that the same did not have sufficient play to meet the exigencies of the swaying movements of the engine around curves and other portions of the track; that said short safety chains operated to pull up the truck at the curve where the same was first derailed, so as to contribute to and be one of the causes of the wheels of said front truck leaving the rails; that the

chains were a part of said locomotive and were not in proper condition and safe to operate in the service to which the same were put, and that the same did not function properly. This amendment is made to apply to both counts of the petition.

[fol. 171] The defendant, gentlemen, has failed its answer in the case. You will have the pleadings out before you and you can read them all if you want to. I am simply calling your attention to the substance of it. The defendant admits the second paragraph in each count, to the effect that it is a railway corporation running a line of track and having an office and agent in Haralson county. It further admits the fourth paragraph of each count to the effect that on February 14, 1933, the decedent, Cox, was an engineer in the employment of the defendant and that on that day he was engaged in interstate commerce and that the defendant railway was engaged in interstate commerce, in that decedent as engineer was driving a passenger train of the Southern Railway from Birmingham, Alabama, to Atlanta, Georgia. The answer either denies all the other averments of both counts of the petition, or states that for want of sufficient information defendant can neither admit nor deny the same. In answering the fifth paragraph of both counts the defendant's answer states that while rounding a curve on defendant's track the wheels of the front truck of the engine struck a rock which had been placed on the track by someone without the knowledge of the defendant or its employees, and were thrown from the rails, while the drivers and other wheels of said engine remained on the track; that the front trucks were out of view of the engineer and fireman and were suspended in such a way that the engine still continued to function normally for a short distance.

In answering paragraph six of the first count, the defendant says that its investigations showed that after the wheels of the front end of the engine left the rail it ran for a distance of approximately seven-tenths of a mile until it reached a switch going out to the right from the main line, at which point the engine was derailed and turned over; that apparently said front wheels of said truck were off the [fol. 172] track from the time the same struck the rock, and apparently when the front wheels struck the switch they were thrown to one side and derailed and turned over the engine; that in the derailment Cox, the engineer, was so injured that he died in about one hour.

Substantially the same answer is made by the defendant in answering the ninth paragraph of the second count. In answering paragraph nine of the first count, the defendant says that the truck struck the rock at a point approximately 1.35 miles west of the station of Bremen on a rather sharp curve to the left in the direction in which the engine was going; that it assumes the decedent was on his seat box on the right side of the engine, which would have placed him on the outside of the curve; and that its information is that the train was proceeding at the regular schedule of speed.

In answering the tenth paragraph of the first count, the defendant says that the iron plates on the ties on the outside of the rail had openings or holes for two spikes, and that there was a spike in only one of said openings, all of which was usual and customary not only at that point but at all other points along its line of railway and is the usual and customary way for said plates to be spiked.

Answering paragraph fifteen of the first count, the defendant says that the engine was equipped with an experimental device known as "Wright's Little Watchman," which was attached to certain apparatus connected with said engine and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train; that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause the tripping of said valve and the application of said brakes; that the same is merely an experimental device which will not operate at all times when said truck wheels leave the track but will operate [fol. 173] only when conditions develop which will trip the same; that said device is not in use on all railroads and is not required to be used under the Safety Appliance Act of Congress or any regulations made in pursuance thereof, and that it was no part of the duty of the decedent to inspect the same.

The defendant in answering paragraph ten of the second count makes the same answer as to the device known as the watchman as is made in response to paragraph fifteen of the first count.

In answering paragraph eight of the second count, gentlemen, the defendant says that the point where the rock was on the track was on a curve to the left; that the engi-

neer's duties placed him on the outside of the curve. The defendant denies that the curve extended anything like three hundred yards, and in the defendant's answer it is stated that it assumes that the fireman was at some point on the left side of the engine in the performance of his duties. It admits that the engine was provided with an automatic stoker which fired the same by machinery, the valves being operated by the fireman. The defendant denies any liability to the plaintiff in any sum whatever as to each count of the petition. They deny generally the remaining allegations of the plaintiff's petition and amendment. You will have the pleadings out with you and you can look to this more fully if you so desire. I have only read the substance of the pleadings, but I think I have read a sufficient part of the pleadings to define to you the issues in the case. You are instructed that if the plaintiff recovers in this case she must recover upon the allegations of negligence contained in the petition, and she cannot recover upon any state of facts outside the allegations of the petition. She is not required, however, to prove every allegation of alleged negligence set forth in her petition. It is sufficint if she shows by the evidence that any one [fol. 174] or more of these alleged acts occurred, and that they constituted negligence, and that such act or acts was or were the proximate cause of the decedent's death. If the evidence shows this, she is entitled to recover damages.

You are instructed that the burden is upon the plaintiff to make out her case to the satisfaction of the jury by a preponderance of the evidence. By a preponderance of evidence is meant that superior weight of the evidence upon the issues involved which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other. In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case; the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of witnesses,

though the preponderance is not necessarily with the greater number.

The law under which this case is being tried is the Act of the United States Congress of 1908, so far as is applicable to this case, that act provides that every common carrier by railroad, while engaged in commerce between any of the several states of the Union, shall be liable in damages for the death of any employee in such commerce, such liability is to be the employee's personal representative for the benefit of the surviving widow and children of such employee, such liability to be where death results, in whole or in part, from the negligence of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, [fol. 175] engines, appliances, machinery or other equipment. This law further provides that in all actions brought against any such common carrier by railroad under any of the provisions of this Act to recover damages for the death of an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

I will now charge you, gentlemen, upon the aspect of the plaintiff's case which deals with alleged negligence other than the charge of violation of what is known as the Safety Appliance Act and amendments thereto. I will later charge you separately as to the effect of any violation of the Safety Appliance Act. The law which is now being given to you is applicable to all the other charges of negligence contained in the two counts of the petition, except those relating to the Safety Appliance Act.

There are certain risks of an employment which an employee assumes in entering employment, and if injury results from some of these assumed risks, then there is no liability for such injury on the part of the employer. An employee assumes the risks of such dangers as are normally and necessarily incident to the occupation, whether

he is aware of them or not. A risk of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work, or suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that any ordinarily prudent [fol. 176] person under the circumstances would have observed and recognized them. An employee does not, however, assume the risk of conditions of which he is not aware or which, in the exercise of ordinary care, he would not have discovered.

You are instructed, gentlemen, that negligence is the failure to exercise legally required care. The care which was required of the defendant in this case, as well as that which was required of the decedent, was ordinary care. Ordinary care is that care which every prudent person would exercise under the same or similar circumstances. As I have just stated, negligence is the failure to exercise the care which the law requires. If the plaintiff in this case has not proved by a preponderance of the evidence that the defendant was negligent in some or all of the particulars described in the petition, or that the defendant had violated, in the respect stated in the petition, what is known as the Safety Appliance Act as applied to the locomotive and its parts and appurtenances, and if the plaintiff has not likewise proved that such negligence or such violation of the Safety Appliance Act was the proximate cause of the death of the decedent, there can be no recovery of damages in this case.

If you find from the evidence that the decedent was negligent and that his negligence was the sole and only cause of his death, then there could be no recovery in this case. You are instructed, however, that if the defendant was negligent in some or all of the particulars described in the petition, and if such negligence in part was the cause of the death of the decedent, then and in such event if you find that the decedent was guilty of negligence, such negligence of the decedent would not entirely defeat a recovery, but would only diminish or reduce the damage which would be awarded to the plaintiff, and in such case of negligence on [fol. 177] the part of the decedent the damages would be

diminished by the jury in proportion to the amount of negligence attributable to the employee, Mr. Cox. If the jury find from the evidence that the decedent was negligent in the manner of performing his duties, or in not properly guarding against danger under the circumstances of the case, then you would consider these acts of negligence, if you find the defendant was guilty of negligence which in part contributed to the death of the decedent. In such case, if you find that the decedent was guilty of some negligence, but that the defendant's negligence was also in part the cause of such death, then the decedent's negligence would be considered by the jury in reduction of damages, and such negligence would reduce the amount in proportion to the amount of negligence attributable to the decedent.

Negligence is a question of fact for the jury under proper instructions from the court. The court can give the jury the general standards of diligence and care, but as to whether the conduct of the parties come up to or falls short of those standards, is a question of fact for the jury.

The defendant contends in this case that it was not negligent in any respect, and this contention goes to every claim made by the plaintiff, and you will consider this contention of the defendant in deciding upon the question as to whether there is any negligence in the case and as to whether there is any liability or not in the case.

The defendant further claims that the decedent met his death as a result of risks assumed by him in the service of the defendant. You will consider this contention in the light of the instructions which I have given you upon this subject. I will now instruct you upon the allegation contained in paragraph 15 of the first count and paragraph 10 of the second count, the substance of which is that there was upon the engine an appliance known as a "watchman," [fol. 178] which consisted of cylinders, valves and other apparatus, including air, and which was under the body of the engine and extended from the back to the front end thereof, and which automatically, whenever the front wheels of the engine should leave the track, was designed, by means of a valve which was tripped by the derailment of the wheels, to apply the brakes on the entire train, and that had this appliance been in repair and had this appliance functioned, the train would have stopped long before striking the right hand switch and would have saved the life of

the decedent. The allegation is that this contrivance was not in working or functioning order at the time of the derailment, that the same failed to apply the brakes as was its design and purpose, and that had the "watchman" functioned, the train would have stopped long before striking the right hand switch.

The court charges the jury that under the Act of Congress in force at the time of the alleged derailment in this case and death of the decedent, it was provided as follows: "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." You are further instructed that the law to which the court has called your attention applies to the locomotive, its boiler, tender and all parts and appurtenances thereof, and the court charges the jury that a contrivance built on the engine and attached [fol. 179] to certain apparatus connected to the engine, and which was so designed that under certain conditions the derailment of the front wheels would trip a valve and thereby apply the air on the brakes of the train, is a part and appurtenance of the engine or locomotive; provided, gentlemen, you find the following to be true:

The defendant contends that the device known as Wright's Little Watchman is really in an experimental stage, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and therefore it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence, (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as con-

tended, was simply an experiment, and this limited or experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly.

Now, on the other hand, I charge you that if this device, known as Wright's Little Watchman, had been in general use by the defendant, or by railroads in general, for such a length of time and in such general use that it became a fixed and permanent part of the locomotive, and that use was such as to hold out to the decedent, the engineer in this case, that it was a reliable device, that it could be relied upon by him to function, and that any prudent man [fol. 180] would have relied on this device under all the circumstances of the case, then the failure of this device to operate or to function, which failure was caused by and brought about by a failure to inspect the same and keep the same in proper working order, then and in that event such failure to operate or function would be negligence on the part of the defendant. If you find, gentlemen, that this device was used, as I say, so generally used for such length of time by the defendant that it became a part and appurtenance of the engine, and that the decedent was authorized to rely on it at this particular time by the conduct of the defendant in putting it on the engine and using it, under all the circumstances, then the following law would apply and this would be considered a part and appurtenance of the engine or locomotive at this particular time. I charge you that the duty put upon the defendant railway by the Act of Congress which the court has called your attention to, to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to operate in the service to which the same are put, is an absolute duty on the railway. It is not subject to any limitation or condition, is positive and not dependent, and unqualified by any consideration whatever. Now, gentlemen, if the defendant at that particular time put this device there for the purpose for which it was intended, it was the duty of the railroad company at this

time to see that it was in proper working order, whether it was in an experimental stage or not. Failure to inspect it and see that it was in proper working order would be negligence, provided of course that the derailment of the locomotive was brought about by failure to have the "little watchman" in proper working order. These are questions for you. All questions of fact are for you. If you believe from the testimony that the defendant failed to have the part and appurtenance of its locomotive, known as the [fol. 181] watchman, in proper condition and safe to operate in the service to which the same was put, and if the same did fail to function and operate, and if its failure to so operate, because it was not maintained in good condition, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case. Of course, the circumstances at the time should be such as to cause a reasonably prudent man and a reasonably cautious man to have relied upon the "little Watchman". I mean to say that if the circumstances were such as to hold out to Mr. Cox that this contrivance was there and was in proper working order, and it was not, then of course if the death was caused by the failure of this contrivance of work, if that was the cause of it, then of course the railroad company would be liable, provided of course that they did not inspect it and put it in proper working order at that particular time.

If the jury believe from the evidence that the initial or first derailment at a distance of 1.35 miles from the depot at Bremen occurred from some cause other than the railway company's negligence, such as the placing of a rock on the track, still, if you believe from the evidence that this engine was equipped with a part and an appurtenance known as a watchman, which was designed to trip a valve when the front trucks should become derailed, and if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the

train would have been stopped and the decedent's life [fol. 182] saved, then I charge you in that event the defendant would be liable in this case for damages to the plaintiff. This, gentlemen, is qualified under the charge I gave you a while ago on the question of whether or not the "little watchman" had been in use so long and to such an extent by the railroad company that the engineer was authorized to expect it to operate and to rely upon its functioning, and was not simply put there as an experiment on this occasion and known to him as such or should have been known to any prudent man under all the circumstances.

Now, gentlemen, the Employers Liability Act of 1908 provides that no employee who may be killed in the employment of a carrier engaged in interstate commerce, and who is himself engaged in such commerce, shall be held to have been guilty of contributory negligence in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the death of such employee. Therefore, I charge you that if Mr. Cox met his death because of the defendant's violation of the Safety Appliance Act of Congress which I have read to you, then I charge you that the defendant railway can neither claim that Mr. Cox assumed the risk of the result of such violation, nor would any contributory negligence of Mr. Cox be treated to reduce the damage, if the violation by the railway of this statute contributed to his death.

If you find under the instructions given you, either on the first branch of this case as to the issues of negligence on the part of the railway company and on the part of the decedent, or on the second branch of the case as to alleged liability for failure to comply with the Safety Appliance Act, then you would go no further in your deliberations, but you would return a verdict for the defendant. If on the other hand you find for the plaintiff, it would be your duty to assess the damages. Of course, in considering the [fol. 183] question of damages, the jury will consider the rule which the court has previously given as to the effect of the decedent's negligence, if any, upon the amount of recovery, all of which I have charged you fully upon. The charge upon the measure of damages relates to the full amount of damages which are recoverable in a case of this kind, and you will bear in mind, as just stated, any reductions in that amount under the instructions herein-

before given you, if you apply them to the measure of damages.

You are instructed that this action is brought for the benefit of the surviving son and daughter of the decedent, who are named in the petition. You are instructed that the measure of damages in such a case as this is the financial benefit which might reasonably be expected from the decedent to the children, who are the beneficiaries, in a pecuniary way. The damages are such as flow from the deprivation of pecuniary benefits which the beneficiaries might reasonably have received if the decedent had not died from his injuries.

The mortality tables have been introduced in evidence for the purpose of enabling you to have light on the question of how long the decedent might have lived. Such tables are not binding upon you, and you may make your own finding upon this question if you desire to do so, but you may use the tables, and if you use them, the mortality table is only designed for the purpose of giving the expectancy in years of persons at given ages.

If you find for the plaintiff, and if you find that the decedent's life was of financial benefit throughout the whole or part of his expectancy to the two children named in the petition, then you would decide on the amount of that benefit to these children so long as you find the same would last. When you decide upon the amount of the pecuniary benefit which the decedent's life would have been to his two children, if any, under the conditions hereinbefore stated, it [fol. 184] would not be proper to give the gross amount of these benefits in the verdict which you would render in this case, because, inasmuch as the sum is paid down all in cash, the amount would have to be reduced to its present cash value.

You are instructed that the present cash value of the future benefits of which the beneficiaries were deprived by the death of the decedent, making adequate allowance according to the circumstances for the earning power of money, is the proper measure of damages in an action of this character. In determining what rate of interest you should find the money would bring, and hence what rate of discount should be used by you in reducing this amount to its present value, you would consider all the facts and circumstances of the case. Local conditions are not to be dis-

regarded, nor should the discount necessarily be at what is commonly called the legal rate of interest, that is, the rate limited by law beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities without the exercise of financial experience and skill. The compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill. It is a matter for you to decide as to what the earning power of money at this place and this time, on the best and safest investments, would be. You are authorized to make the calculation, reducing the sums found by you to their present value by any proper mathematical calculation. In other words, whatever the annual loss of these beneficiaries might be throughout the expectancy of the decedent, or throughout such part of his expectancy as you decide that these beneficiaries would receive annual benefits, the sum would be reduced to its present cash value upon the rate of interest which you fix as reasonable and right under the circumstances of this case, as I have just stated. In [fol. 185] reducing these sums to their present cash value, you may use any proper mathematical method of determining that question. The theory of the law is, in giving a present cash value for benefits paid in future installments, to give such sum as put out at what you find to be the proper rate of interest which the beneficiaries could secure on safe investments at this time and place, would earn the amount of these future installments which you find the beneficiaries would have received had the decedent lived, and by taking off a part of the principal each year would, at the end of such time as these annual benefits are estimated for, be entirely exhausted.

Now, in estimating the earnings of a man, it rarely if ever happens that a man labors every day until his death, or receives all the while a fixed and regular income from his labor, nor does his capacity to earn money often remain undiminished until old age. In arriving at what you might find to be the earnings of the deceased, which is one of the steps you would have to take in determining how much pecuniary benefit his life would be to the beneficiaries, you should take all these things into consideration: Feebleness of health, actual sickness, the loss of employment, voluntary

abstaining from work, dul-ness in business, reduction in wages, the increasing infirmities of age with the corresponding diminution of earning capacity, and other causes which contribute in a greater or less degree to decrease the earnings of a life-time. In estimating what a man might earn throughout his expectancy, a proper allowance and deduction should be made in favor of the defendant for any diminution in labor which would result from any of these sources. The defendant is not responsible for the consequence of the acts of others not its agents, nor for results which, in any event and without reference to the conduct or negligence of the defendant, have come to pass.

[fol. 186] If upon considering the whole case you find that the defendant is not liable to the plaintiff, you would return a verdict for the defendant, and in that event the form of your verdict would be, We the jury find for the defendant. If, on the other hand, you find for the plaintiff, the form of your verdict would be, We the jury find for the plaintiff against the defendant so many dollars and cents, stating it in one lump sum. Whatever your verdict may be, date and sign it by your foreman and let us know, and you will be allowed to publish it in court.

The above and foregoing eighteen typewritten pages approved as correctly setting forth the charge of the court in the above stated case. Let the same be filed as a part of the record in said case.

This April 5, 1934.

J. R. Hutcheson, J. S. C. T. C.

[File endorsement omitted.]

[fol. 187] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 188] [File endorsement omitted.]

[fol. 189] IN COURT OF APPEALS OF GEORGIA

24153

SOUTHERN RAILWAY CO.

v.

LUNSFORD, ADMX., ETC.

OPINION

By the Court:

SUTTON, J.:

Mrs. Olivia Cox Lunsford, as adminstratrix of the estate of James Monroe Cox, brought suit for damages against the Southern Railway Company, on account of the death of her intestate by reason of the defendant's alleged negligence. Plaintiff averred that Cox's death ensued when a locomotive-engine of the defendant, of which Cox was an engineer, and which he was running from Birmingham, Ala., to Atlanta, Ga., overturned and wrecked, and Cox was mangled, burned, and scalded to his death by reason of the steam and boiling water escaping from the overturned engine; and that this was the result of the alleged negligence of the defendant in having a defective locomotive-engine, insufficient appliances, and a defective and insecure track and roadbed. Plaintiff alleged that defendant's locomotive was equipped with an apparatus known as a "watchman," and that, had the same been in proper repair and condition when the front trucks left the rail, it would have tripped a trigger and automatically applied the air to the airbrakes and stopped the engine within 200 yards, thereby preventing the engine from finally leaving the rails and overturning; and it was alleged that the defendant failed to inspect said engine before leaving Birmingham on this trip and that an inspection would have disclosed the condition of the "watchman." Plaintiff alleged that the action was brought under the act of Congress of April 22, 1908, and all amendments thereto, regulating the liability of interstate carriers. She further set up that she was the daughter of the deceased, who was a widower, that he had one other child, a son, and that the deceased contributed $200 a month of [fol. 190] his earnings to the support of his children. There

was an allegation in the second count of the petition that a rock or other object was negligently allowed by the defendant to be on the outside rail at the point where the front trucks left the rails, which should have been discovered by the defendant's employees. It was alleged in both counts that the front trucks of the engine first become derailed and after running about seven tenths of a mile on the ties off the rails, the engine came to a switch, whereupon it finally jumped the track and turned over, and that from this switch to where the engine turned over, about 100 yards, the crossties were in a rotten condition, all of which contributed to the wreck of the engine. The material difference between the two counts is that in the first the plaintiff alleged that there was a sharp curve at the place of the initial derailment, and that the improper elevation of the rails, the rotten ties, and the absence of proper spikes at this point had caused the track to become defective and thereby caused the derailment of the front trucks, which should have been remedied by the defendant's employees; and in the second count, it was alleged that a rock or other object at this point caused the derailment, which likewise could have been discovered by the defendant's section foreman had he been performing his duty, and likewise could have been seen by the fireman of the engine had he been keeping a proper lookout from his side of the cab, but which could not be seen by the deceased from his side of the cab. It was contended by the plaintiff that had the "watchman" attached to the locomotive been in proper condition, the subsequent overturning of the locomotive would have been averted; and also that the defendant's failing to discover the defective [fol. 191] "watchman," which proper inspection would have disclosed, which it was not the duty of the deceased to make, but which it was the duty of defendant to make, was negligence, and had the condition of the watchman been discovered, the wreck would have been prevented.

The defendant demurred to both counts of the petition upon the ground that they set up no cause of action against it, and upon various special grounds. The trial judge overruled the demurrer upon all grounds. To the overruling of the demurrer the defendant excepted pendente lite, and assigned error thereon in the bill of exceptions.

Plaintiff amended her petition, the substance of the amendment being that the safety chains attached to the

front end of the front trucks on the engine were too short and operated to pull the trucks up at the point where the engine was first derailed, and therefore were a contributing factor to the engine's leaving the rails, and that these chains were not in a proper condition and that it was not safe to operate the locomotive in that condition, and that the defendant and its agents placed the chains upon its engine in this manner and condition.

Defendant demurred to this amendment upon the ground that the allegations thereof were vague and were mere conclusions, and also that they furnished no issuable facts or reason why the defendant was liable for the death of the deceased, and that there were no averments showing or tending to show that these chains were required by the safety-appliance acts of Congress and there was nothing to show that the manner in which these chains were placed on the engine was a violation of the acts of Congress or of the rules or regulations of the interstate-commerce commission. The trial judge overruled this demurrer, and the defendant excepted pendente lite, and assigned error thereon in the bill of exceptions.

[fol. 192] On the trial the plaintiff introduced evidence tending to support the allegations of her petition. The defendant defended the action upon the theory that what caused the derailment was the rock placed upon the track by some miscreant, but not by any of its employees, that the "watchman" was not out of repair, that the wreck was not caused by the "watchman" not being in condition, that the "watchman" was not a part of the locomotive and was not required by the safety-appliance acts or any rule of the commission, that the wreck was not caused by any act of negligence or otherwise, or any omission of duty upon the part of the defendant, that the deceased did not earn the monthly sum alleged, and that it was not liable to the plaintiff on account of the death of the deceased, it not being guilty of any negligence, as alleged.

The trial resulted in a verdict for plaintiff for $5,000. Defendant moved for a new trial, the motion was overruled, and a writ of error was brought to the Supreme Court, where it was transferred to this court, because this court and not that court had jurisdiction thereof.

[fol. 193] 1. An action may be properly brought under the Federal safety-appliance acts by the administratrix of

the deceased employee of an interstate carrier, who was a widower, and contributed a part of his earnings to the support of his two children, one of whom is the administratrix, although neither of them is a minor. It is contribution rather than dependency that gives rise to an action for the death of an employee of an interstate-railway company under the safety-appliance acts. U. S. C. A., Title 45, § 51, notes on pp. 93, 360-5; Moffett v. B. & O. R. Co., 220 Fed. 39; Chesapeake & R. Co. v. Shirley, 218 Ky. 337 (291 S. W. 395); W. & A. R. v. Townsend, 36 Ga. App. 70 (135 S. E. 439).

2. A petition alleging that the defendant railway company was negligent in the manner in which it maintained its railroad-track at a certain curve thereon, that the death of plaintiff's intestate was caused by the derailment of the front trucks of a locomotive on account of the unsafe and insecure track and roadbed at this curve, the ties being rotten and the spikes being loose, which was all apparent and visible, causing the outside rail to become insecure and without sufficient elevation, allowing the front trucks of the locomotive, of which the decedent was engineer, to get off the rails at this point; and alleging that the defendant was negligent in allowing its tracks to remain in this condition and that the same should have been remedied by the defendant's section-foreman had he properly performed his duties in the inspection and maintenance of the tracks at this curve, set out a case good as against demurrer. [fol. 194] Questions of negligence, proximate cause, diligence, due care, etc., are generally for a jury to determine, except in plain and unmistakable cases. If the defendant was negligent, as alleged, in the maintenance of its tracks, and if this negligence caused the front trucks to derail, which in turn caused the engine to turn over, killing the deceased, nothing else appearing, defendant would be liable to the plaintiff. L. & N. R. Co. v. Bean, 49 Ga. App. 4 (174 S. E. 209): Central of Ga. Ry. Co. v. Leonard, 49 Ga. App. 689 (2) (176 S. E. 137).

3. In pleading, reasonable certainty is all that is required. Matters relating to the structural condition of a railroad-track, or of a locomotive engine, or of appliances thereon concerning defects in the same, where it is charged that a railway company is negligent in their condition, in

failing to keep them in proper repair, in failing to inspect the same, and that such defective locomotive, appliances, and insecure track and roadbed contributed to and caused the death of plaintiff's intestate, need not be alleged with minute particularity as to details, condition, structure, and so on. The plaintiff is not required to do more than clearly and definitely describe these matters. They are such as lie peculiarly within the knowledge of the railroad company, and all that is required is for the plaintiff to state her cause of action with sufficient definiteness and completeness to enable the defendant to ascertain the nature of the charges made against it and of the acts of negligence alleged, so that it may properly prepare its defense thereto. Cochran v. Kendrick, 43 Ga. App. 135, 138 (158 S. E. 57); Charleston, etc., R. Co. v. Attaway, 7 Ga. App. 231 (66 S. E. 548); A. C. L. R. Co. v. Davis, 5 Ga. App. 214, 217 (62 S. E. 1022); [fol. 195] Southern Ry. Co. v. Black, 141 Ga. 35, 38 (80 S. E. 323); King Hardware Co. v. Ennis, 39 Ga. App. 355 (5) (147 S. E. 119); Central Ry. Co. v. Brandenberg, 129 Ga. 115, 120 (58 S. E. 658); Bittick v. Ga., Fla. & Ala. Ry. Co., 136 Ga. 138, 140 (70 S. E. 106); Cedartown Cotton, &c. Co. v. Miles, 2 Ga. App. 79 (58 S. E. 289).

4. The gist of section 23 of the act of Congress of April 22, 1908, as amended in 1911 and 1915, known as the Federal safety-appliance act, which was passed for the purpose of regulating the liability of interstate carriers, is to make it "unlawful for any carrier to use * * * any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which put," and further that "said locomotive, its boiler, tender and all parts and appurtenances" must be inspected as therein provided U. S. C. A., Title 45, § 23. This law imposes on carriers in interstate commerce the absolute duty to keep their locomotives and all the parts and appurtenances thereof free from defects and safe to operate. It is not a question of negligence, but the railway company is bound to see that all parts and appurtenances are in a safe and proper condition. Lehigh Valley R. Co. v. Beltz, 10 Fed. (2d) 74; Hines v. Smith, 275 Fed. 766; Frederick v. Erie R. Co., 36 Fed. (2d) 716; W. & A. R. Co. v. Townsend, supra; W. & A. R. v. Meister, 37 Ga. App. 570 (140 S. E. 905).

The only defense that an interstate carrier can make to a suit based on the Federal law above referred to, brought for the death of an employee, is that proper appliances were provided and were maintained in good condition, and that the appliance alleged to be defective was not a contributing cause to the death of such employee. S. A. L. Ry. [fol. 196] Co. v. D'Avignon, 41 Ga. App. 263 (153 S. E. 96).

5. A safety device constructed and designed for the purpose of automatically applying the airbrakes whenever the front trucks of a locomotive engine leave the rails from any cause, called a "watchman," which is attached to the front trucks under the boiler of the engine, some 35 or 40 feet in front of the cab where the engineer sits, and which will, if in proper working condition, when the trucks leave the rails and drop down as much as two and a half inches, trip a trigger, which opens a valve and puts the airbrakes on, and will stop the train within 200 yards; and which in this case had been attached to the locomotive for from five to seven years, and with which all of defendant's locomotives on this division are equipped, is properly a part and appurtenance of the locomotive, within the purview of the Federal safety-appliance laws, requiring a locomotive engine of an interstate railway company and all parts and appurtenances of such locomotive to be in proper condition to operate safely, and that they be kept in that condition, although the appliance is not one that is required by such Federal laws to be attached to the locomotives of interstate railway companies.

6. An action brought by the administratrix of a deceased railroad engineer, whose death resulted from the overturning of a locomotive engine of the defendant railway company, which the decreased was in charge of and operating in interstate commerce as engineer, under the Federal act of 1908, as amended in 1911 and 1915—in which act it was provided that all locomotives, boilers, and tenders, and all parts and appurtenances thereof, must be in proper working condition at all times, and that the locomotives and all [fol. 197] such parts and appurtenances must be properly inspected—where the petition alleged that there was attached to the locomotive in question a contrivance known as a "watchman," which was a device designed so that when the front trucks got off the rails for any reason it

would trip a trigger and cause the airbrakes on the entire train to be put on and would stop the movement of the train within 200 yards, and that this appliance was not in proper condition and did not work on this particular occasion, but that when the front trucks of this engine got off the rails the airbrake was not applied, and the front trucks of the engine ran along upon the ties for about seven-tenths of a mile, when the same came to a switch, and the trucks were thrown under the engine in such a way as to cause the engine to turn over and kill the engineer, a cause of action was set out under the Federal safety-appliance statutes, where it was further alleged that the defendant railway company had all its locomotives so equipped with the "watchman," that the same had been in use thereon for several years, that the deceased engineer had no other way of ascertaining when the front trucks of his engine were off the rails, and that had this little "watchman" been in proper working order it would have automatically applied the air and stopped the train and prevented the subsequent overturning of the locomotive which killed the decedent. This is so even though the Federal safety-appliance act and the rules and regulations of the interstate-commerce commission relative to interstate carriers do not specifically designate this particular contrivance as a safety device which must be placed upon the locomotives of interstate carriers, because when the defendant placed such device upon its locomotives it became a "part and appurtenance" thereof within the purview of the Federal statutes rela- [fol. 198] tive to safe appliances of interstate carriers. The fact that the little "watchman" was not a device in general use by other railway companies, and was not a standard safety appliance, would not prevent it from becoming a part and appurtenance of the locomotives of the defendant. If a part and appurtenance thereof, then, under the safety-appliance laws, it must be at all times kept in proper working condition, and if, as a result of the failure of such appliance to be in proper condition and to work on this particular occasion, the decendent, an engineer of the defendant railway, met his death, the railway company would be liable. It was an absolute duty on the part of the railway company to see that its locomotive, boiler, tender and "all" parts and appurtenances thereof were in proper condition and were kept in proper condition. S. A. L. Ry. Co.

v. D'Avignon, supra; Hines v. Smith, 275 Fed. 766; Baltimore & O. R. Co. v. Groeger, 266 U. S. 521 (45 Sup. Ct. 169); Johnson v. Southern Pacific Co., 196 U. S. 1 (25 Sup. Ct. 158, 49 L. Ed. 363); Lehigh Valley R. Co. v. Beltz, 10 Fed. (2d) 74; Kilburn v. Chicago, &c. R. Co., 289 Mo. 75 (232 S. W. 1017); Fredericks v. Erie R. Co., 36 Fed. (2d) 716; W. & A. R. v. Townsend, supra; Wyatt v. N. Y. &c. R. R. 45 Fed. (2d) 705.

7. The trial judge did not err in charging the jury in substance that if they found that the little "watchman" attached to the locomotive in question by the railway company was just an experiment and not designed as a part and appurtenance of the locomotive, there would be no duty resting upon the defendant to keep the "watchman" in repair or in functioning condition. This charge worked no injury to the defendant.

8. The trial judge did not err in charging the jury that [fol. 199] if they found from the evidence that the watchman had been in general use by the defendant for such a length of time that it became a fixed and permanent part of the locomotive and was, as to the decedent, held out as a part and appurtenance thereof, it was then such a part and appurtenance of a locomotive as is meant by and comes within the purview of the safety-appliance laws.

9. The trial judge charged the jury that it was the defendant's duty to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to operate in the service to which put, that this was an absolute duty of the railway company that it was for the jury to determine under the facts whether or not the "watchman" was in proper working order, and that if the jury "believe from the testimony that the defendant failed to have the part and appurtenance of its locomotive, known as the 'watchman' in proper condition and safe to operate in the service to which the same was put, and if the same did fail to function and operate, and if its failure to so operate, because it was not maintained in good order, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case. Of course, the circumstances at the time should be such as to cause a reasonably prudent man and a reasonably cautious man to have relied upon the little 'watchman.'" This was a correct statement of the

law, with the exception of the last sentence; which was not error as against the defendant.

10. The court also charged the jury that if the initial derailment occurred from some cause other than the defendant's negligence, "still, if you believe from the evidence that this engine was equipped with a part and appurtenance known as a 'watchman' which was designed to trip a valve when the front trucks should become derailed, and [fol. 200] if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this 'watchman' to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated, the train would have been stopped and the decedent's life saved, then I charge you in that event the defendant would be liable in this case in damages to the plaintiff." This charge was not erroneous and was not subject to any of the criticisms directed against it. Under the charge, as applied to the evidence, the jury were authorized to find that if the "watchman" had functioned, the brakes would have been applied, and that, if the brakes had been applied, the engine would not have subsequently overturned and killed the decedent, and that if the "watchman" had been in proper condition it would have functioned.

11. The charge of the court as a whole was correct and submitted the issues in this case to the jury in a fair and proper manner. There were two theories in the case, one of negligence and the other based on the safety-appliance laws, and the judge properly separated these theories and instructed the jury as to the same. None of the special assignments of error show any error as against the defendant. There was evidence tending to substantiate the plaintiff's case on both theories. The verdict was authorized, and the action was properly instituted by the plaintiff as administratrix of her deceased father, who contributed to the support of his children.

[fol. 201] 12. It follows, from the foregoing rulings, that the petition set out a cause of action as to two theories,

and the trial judge did not err in overruling the general demurrer; that the special demurrers were properly overruled, and the demurrer to the amendment was not well taken; and that there was evidence to support the verdict, and no error appeared upon the trial of the case, and the verdict was not contrary to law, and the trial judge did not err in overruling defendant's motion for new trial.

Judgement affirmed.

Jenkins, P. J., and Stephens, J., concur.

[fol. 202] In Court of Appeals of the State of Georgia

Judgment—February 22, 1935

This case came before this court upon a writ or error from the Superior Court of Haralson County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Jenkins, Stephens and Sutton, JJ., concur.

[fols. 203-218] Petition for Rehearing, covering 15 pages, filed Feb. 28, 1935, omitted from this print. It was denied, and nothing more by order of March 2, 1935.

[fol. 219] Court of Appeals of the State of Georgia

Order Denying Motion for Rehearing—March 2, 1935

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

[fol. 220] IN COURT OF APPEALS OF THE STATE OF GEORGIA

[Title omitted]

NOTICE OF INTENTION TO APPLY FOR CERTIORARI—Filed March 2, 1935

To Honorable Logan Bleckley, Clerk of Court of Appeals, of Georgia, State Capitol, Atlanta, Georgia:

Now comes Southern Railway Company, Plaintiff in Error in the above stated case, and, being dissatisfied with the decisions of the Court of Appeals of Georgia therein, gives this notice within ten days of the judgment of the Court of Appeals in said matter, that it intends to apply to the Supreme Court of Georgia for a writ of certiorari, to correct the alleged errors, all as provided by the rules of said Court.

This the 2nd day of March, 1935.

Southern Railway Company, Plaintiff in Error, by E. S. Griffith, Walter Matthews, Maddox, Matthews & Owens, Its Attorneys at Law.

[File endorsement omitted.]

[fol. 221] SUPREME COURT OF THE STATE OF GEORGIA

NOTICE OF APPLICATION FOR CERTIORARI—Filed March 28, 1935

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day an application to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of Southern Railway Co. v. O. C. Lunsford, Admx.

K. C. Bleckley, Clerk Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 222] SUPREME COURT OF GEORGIA

ORDER DENYING WRIT OF CERTIORARI—May 29, 1935

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

All the Justices concur.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 223] Clerk's certificate to foregoing paper omitted in printing.

[fol. 224] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for writ of certiorari to the Court of Appeals of the State of Georgia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 399

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

MRS. OLIVIA COX LUNSFORD, as Administratrix of the Estate of J. M. Cox, Deceased, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA, AND BRIEF IN SUPPORT THEREOF.

G. E. MADDOX,
H. O'B. COOPER,
SIDNEY S. ALDERMAN,
Attorneys for Petitioner.

S. R. PRINCE,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No.

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

MRS. OLIVIA COX LUNSFORD, as Administratrix of the Estate of J. M. Cox, Deceased, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

To the Honorable the Supreme Court of the United States:

Your petitioner, Southern Railway Company, prays this Court to review on writ of certiorari a judgment of the Court of Appeals of the State of Georgia in the case of *Mrs. Olivia Cox Lunsford, as Administratrix of the Estate of J. M. Cox, deceased,* v. *Southern Railway Company,* rendered on the 22nd day of February, 1935, (R. 164) and based upon a written opinion by that court rendered on the same date (R. 155-164), but which judgment only became

final on the 29th day of May, 1935, (R. 166) when, after motion for rehearing filed by petitioner was denied by the said Court of Appeals on the 2nd day of March, 1935, petitioner's application for certiorari to review said judgment was denied by the Supreme Court of Georgia on said 29th day of May, 1935 (R. 166).

The Court of Appeals of Georgia was, therefore, the highest court of the state in which a review and decision could be had by your petitioner and its judgment became final on the 29th day of May, 1935. The record in the Court of Appeals of Georgia, the denial by that court of petition for rehearing (R. 164), and the denial by the Supreme Court of Georgia of petitioner's application to that court for writ of certiorari (R. 166), have been printed in this Court and page references herein are to the record as printed for this Court.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This was an action brought by the plaintiff administratrix, respondent here, for damages for the alleged wrongful death of her intestate. It was brought, tried and decided under the Employers' Liability Act, 35 Stat. 65-66, 45 U. S. C. 51-59, and under the Boiler Inspection Act amendments to the Safety Appliance Act, 36 Stat. 913, 43 Stat. 659, 45 U. S. C. 22-34. It was alleged in the complaint and admitted in the answer (R. 7, 12 and 16, 19) and it appears from the evidence without dispute (R. 45, 74, 87, 89) that at the time of the fatal injury the intestate was employed and petitioner was engaged in interstate transportation. He was locomotive engineer driving petitioner's interstate passenger train No. 40 from Birmingham, Alabama, to Atlanta, Georgia.

The judgment of the Court of Appeals of Georgia, here sought to be reviewed, affirmed a judgment for respondent

on a verdict for $5,000 as damages for the alleged wrongful death of her intestate, the engineer of said train. He was killed by the overturning of his locomotive, resulting from the derailment of the front trucks caused by the act of a nine year old negro boy in putting a rock on the rail in the path of the train "to see the train mash it." (R. 91, 92.)

The evidence shows conclusively that the *causa causans* of the tragedy was the mischievous act of the negro child, over whom petitioner had no control and for which petitioner is not responsible. When he saw the train approaching he placed the rock on the track at the point marked "First derailment" on Plaintiff's Exhibit A (R. 99). The crushed rock was found on each side of the rail and beginning a few feet beyond that point there were found the indentations of the wheel flange of the front trucks, which had mounted the rail at the point where the rock was crushed, derailed and had run on the cross ties from that point a distance of about seven-tenths of a mile, until the locomotive reached the east passing track near Bremen, Georgia. At the point marked "Final derailment" (R. 99) the striking of the derailed front truck wheels against the rails of the passing track derailed the entire locomotive and overturned it, causing the death of plaintiff's intestate, the engineer.

The gist of the matter here involved is that, under these circumstances, involving no moral or legal responsibility of petitioner for the death of the engineer, liability was imposed upon petitioner by the judgment sought to be reviewed on the theory that the failure of a device known as "Wright's Little Watchman" to operate so as to apply air brakes in emergency between the first derailment of the front truck wheels and the final derailment of the locomotive, and thus the failure of this device *to intervene to prevent* the final derailment was a violation of an absolute duty under the Boiler Inspection Act making petitioner liable even without fault or negligence. And this liability,

imposed not because the device in any way contributed to or caused the accident, but merely because it failed to intervene to prevent the final derailment, was imposed under the Boiler Inspection Act, although the device was not a part of a locomotive required by that Act or by any rule or test of the Interstate Commerce Commission under that Act, but was an experimental device, not in general use on railroads, but being used experimentally by this petitioner as an added safety device beyond all requirements of law, a device not positive or certain in its action, which would sometimes act in case of a front truck derailment to put air brakes on in emergency and stop the train but as often would fail so to act and furnish this extra-legal safety feature. It was a device which could not possibly endanger the safety of operation of the train. It might or might not, depending on many elements of track curvature, height of rail, grade, adjustment, and unpredictable mechanical functioning, so act as to contribute an extra element of safety over and above all those elements required by law. It was used in the hope that it might furnish this added element of safety but with full knowledge that it could not be relied on to do so with any degree of certainty, that it sometimes would and it sometimes would not.

"Wright's Little Watchman" is a mechanical device the frame of which is attached to the frame of the locomotive. It is illustrated in detail in No. 8, Exhibit "S" (R. 117), in No. 9 (R. 118), and the rough drawing, Exhibit "U" (R. 120). Its position on the locomotive and form are illustrated by the photographs Exhibits "K" (R. 109), "L" (R. 110), "M" (R. 111), "N" (R. 112). Briefly described, the main part of the "Watchman," attached to the frame of the locomotive, consists of a body and a long projecting trigger, mechanically connected with a valve, in turn connected with the air line of the train. The trigger projects into the opening of a rectangular trip bracket attached to the front truck frame. The theory and purpose of the device is that if the front truck becomes derailed, the truck and its wheels drop lower, or strike the cross ties and

bounce higher than normal, or sway out of line sidewise, causing one side of the trip bracket to strike the trigger of the "Watchman," which in turn actuates the valve, and thereby the train air line, setting the brakes in emergency. (R. 74-85.)

Obviously the adjustment of such a device is not an exact science. One adjustment will not suit all conditions of track, curve and speed. If the bracket is set so as to be too close to the trigger, any slight unevenness of track, such as the outside elevation of a sharp curve, will sway the engine sufficiently to cause the bracket to strike the trigger, actuate the valve and stop the train in normal operation. If the bracket is set too far from the trigger, even a derailment of the front truck will not move the bracket sufficiently to strike the trigger and actuate the valve. If the front trucks derail but do not drop or move sufficiently out of normal position, the bracket will not strike the trigger and the device cannot function. The adjustment is a matter of empirical trial and error and cannot possibly fit all conditions of track and speed but must be aimed to fit the greatest number or the average of the conditions and to come within maximum conditions. Necessarily, therefore, it can never be known with certainty whether in a particular situation the device will operate effectively to set the brakes if the front truck is derailed, as happened in this case. (R. 74-85, 93-97.)

1.

Questions Involved.

The questions involved in this petition are: (a) Is this device, known as "Wright's Little Watchman," attached to a locomotive used in interstate commerce, a part or appurtenance of a locomotive within the meaning of the Boiler Inspection Act, 45 U. S. C. 22-34, where such a device is not required by or mentioned in said Act, or in any Safety Appliance Act, or in any of the rules and regulations promulgated in accordance therewith by the Interstate Commerce Commission, especially where it is shown by the evi-

dence that such a device is not in general use on railroads, is an experimental device used by only one railroad on some of its locomotives, and the use of which could not possibly imperil life or limb, but that it is used in the hope that it will operate and thereby add to the safety of the locomotive and train? (b) Does the Boiler Inspection Act place upon the carrier the duty of knowing that every device used on a locomotive, no matter for what purpose, will operate at all times and under all conditions? (c) Does the failure of such a device to operate on a particular occasion so as to add an additional safety element not required by law and thereby prevent serious consequences of an accident otherwise caused constitute a violation of the Boiler Inspection Act? (d) Does the use of such a device place upon the carrier an absolute duty to maintain it in proper condition at all times and impose absolute liability if it fails to function as hoped on a particular occasion?

2.

How the Federal Questions Under the Boiler Inspection Act Arose on the Pleadings.

In both counts of the respondent's (plaintiff's) petition (complaint) there were averments that the derailment was caused by certain alleged insufficiencies and defects in the track; and in the second count of the petition it was claimed that the front trucks struck a rock on the outer rail on a sharp curve in the track and that the alleged insufficiencies and defects in the track contributed to the derailment, and that petitioner's employees were negligent in permitting the rock to be placed on the track and in failing to observe it and stop the train. (R. 6-15.) Petitioner demurred to the averments as to alleged insufficiencies and deficiencies in the track upon various grounds, which were overruled. (R. 21-30.) There was some slight evidence in respect thereto, though the overwhelming weight of the evidence showed that no such insufficiencies or deficiencies existed,

or, if they did exist, that they in no way proximately caused or contributed to the derailment of the front trucks of the locomotive. In its answer petitioner averred that the front trucks of the locomotive were derailed by a rock on the outer rail on a sharp curve, placed there by some miscreant just a few moments prior to the arrival of the train at that point. (R. 19-20.)

The undisputed evidence of the nine year old negro boy, Charley Lee Lowe (R. 91 *et seq.*) was that when he heard the train coming he placed this rock on the track "to see the train mash it," and that when the front wheels struck the rock "the engine ran, after it hit the rock, before the wheels got off, about as far as from here to the wall." He saw the front truck wheels off the track. (R. 92.)

The undisputed evidence further showed the fragments of the rock at the point of first derailment, the marks on the rail and the indentations of the wheels on the ties from that point to the point where the engine overturned. (R. 57-58, 83; 94.)

There were also averments in amendments to the petition that the safety chains were too short (R. 33-34), but there was no evidence in support thereof. The trial judge briefly charged the jury on this phase of the case. (R. 141-142.)

These matters, however, are in no way involved in the questions now presented by this petition, and will not be further considered for the reason, as petitioner insists, that the entire case in the trial court, and especially in the appellate courts of Georgia, turned upon the use by petitioner on the locomotive of the device known as "Wright's Little Watchman," respondent contending and petitioner denying that it was a part or appurtenance of the locomotive within the meaning of the Boiler Inspection Act, and the judgment of the Court of Appeals imposing liability on petitioner as for violation of an absolute duty under that Act, merely because the device failed to prevent the final derailment.

In both counts of the petition it was alleged that the locomotive was equipped with the device above referred to, and that this device was so designed that if the front trucks of the locomotive derailed the air brakes would apply and the train would be stopped (R. 9-10 and 13-14); that the train ran for seven-tenths of a mile after the front trucks were derailed before the locomotive overturned; that the device had not been properly inspected and was not in proper condition and did not operate at the time, and had it operated the train would have been stopped in a distance of two or three hundred yards and the locomotive would not have overturned. Petitioner demurred to the averments of each count of the petition with reference to this device (R. 25-26 and 29-30), the substance of such demurrers being that such averments were insufficient to be made the basis of a cause of action, that this device was not required by and there were no averments tending to show that it was required by the Boiler Inspection Act or the rules and regulations promulgated in accordance therewith by the Interstate Commerce Commission, that the failure of the device to operate was not shown to be the proximate cause of or proximately contributing to the death of the decedent, and that the averments with reference thereto were insufficient in various respects. These demurrers were overruled and exceptions taken thereto (R. 31-32, 38-39), and these exceptions were urged before the Court of Appeals of Georgia. (R. 2-3.)

In its answer (R. 18 and 20) petitioner admitted that there was in use on the locomotive a device known as "Wright's Little Watchman," but averred that this was a device in a mere experimental stage and uncertain in its operations, that its use was not required under the Safety Appliance Acts of Congress, or any regulations made in pursuance thereof; that it would not operate at all times and under all conditions when the front trucks were derailed, but was used in the hope that it might operate if the front trucks were derailed.

3.

The Evidence as to "Wright's Little Watchman."

There was no evidence supporting or tending to support the averments that this device had not been properly inspected or that it was not in proper condition. Had there been, a very different question as to liability for common law negligence would have arisen under the Employers' Liability Act. Here there was merely proof from which it could be inferred that the device did not function to set the air brakes when the front truck wheels derailed. Upon this, absolute liability, regardless of fault or negligence, was imposed on petitioner, under the Boiler Inspection Act.

Respondent took the deposition of Mr. H. B. Goff, Master Mechanic of the Birmingham Division of petitioner, and offered the same in evidence, in which he described this device and the theory upon which it was based (R. 74 *et seq.*). On cross-examination by petitioner's counsel he testified (R. 86):

> "This Wright's Little Watchman is just in an experimental stage. That experiment has been going on with engines on this division of the Southern Railway, within my knowledge, for five or six or seven years. As yet, it has never been demonstrated to be a perfect appliance in the operations; and its operation depends on the roadway conditions, the curvature of the track, the height of the track and everything of that kind; and you have to adjust the framework and the trigger in such a way that it will not block the wheels of the train in the practical operation of the train; and to do that, you have to adjust it for the most extreme conditions that you have to meet in the operation of that engine; and I might say that we have had some delays to trains on account of this device setting; and that would then involve the necessity of increasing the size of the framework; and also we have had some trip brackets, we have had some of the trip brackets to set at different heights on the same class engine; in other words, we couldn't make them exactly the same thing; we have set them the same thing and had them to set

> the brakes in emergency on the line of road. This trip bracket is the same thing we have been referring to here as the framework of the part. It varies on different class engines; I know of one particular instance that we set the bracket the same distance as another engine of the same class, and it set the brakes in emergency on the line of road * * * At times it wouldn't set using the same engine."

Mr. M. E. Madden, the General Superintendent of and a witness for petitioner, testified with reference to this device (R. 96) as follows:

> "On this engine, above referred to was an attachment known as Wright's Little Watchman, and is not a device required by the Interstate Commerce Commission. It does not come on new engines, but is bought by the Southern Railway Company on the outside and applied by it. This device is not used generally by other railroads, and, so far as the undersigned is advised, is not used other than on Southern Railway Company's engines. *The use of this device cannot possibly endanger the operation of the train.* It is used in the hope that it may apply the brakes and stop the train in event of derailment of front trucks. *My experience with this device is that it sometimes works and sometimes will not work, and that it cannot be relied upon with any degree of certainty.*" (Italics ours.)

There is nothing in the record contradicting or tending to contradict this testimony of Mr. Goff and Mr. Madden.

Petitioner insists that this testimony clearly shows: (a) That this device was not in general use; (b) that it is in an experimental stage; (c) that it is uncertain and cannot be relied upon to operate at all times and under all conditions when the front trucks of a locomotive are derailed; (d) that even in theory it would operate only if conditions developed which would bring the bracket in contact with the trigger; (e) that it was used merely in the hope that it might possibly operate if the front trucks became derailed; (f) that its use could not possibly cause "unnecessary peril

to life or limb'' or in any way imperil the safety of the locomotive or train, but on the contrary might possibly add an element of safety not required by law and prevent injury to those on the train; (g) that the use of such a device on locomotives is not required under the rules and regulations promulgated by the Interstate Commerce Commission in accordance with the Boiler Inspection Act; and (h) that the use of this device shows an effort on the part of petitioner to go beyond the requirements of law in promoting the safety of its employees and those on its trains. Petitioner therefore insists that it cannot, under the controlling federal law, be penalized merely because on this particular occasion the device was not effective to provide the additional safety element beyond the requirements of law and to prevent the results of an accident otherwise caused.

The inescapable fact is that if this same locomotive had never had the "Little Watchman" applied to it, it would have compiled with all requirements of federal law, and under the same circumstances the same accident would have happened just as it actually did, without any liability on petitioner as for violation of the absolute duties imposed by the Boiler Inspection Act. With the device actually applied, but failing to operate to set brakes in the particular circumstances, the locomotive was identically as safe to operate and as free from "peril to life or limb'' as if the device had never been applied at all.

4.

Charge to Jury.

The trial judge, after charging the general provisions of the Employers' Liability Act (R. 145), then gave in charge the Boiler Inspection Act, 45 U. S. C. 23 (R. 148), and instructed the jury in substance that the same applied to the case and that under this Act (R. 149, 150, 151) an absolute duty devolved upon the petitioner to so maintain the device that it would operate, and that a failure of the device to

operate would authorize a recovery, if this was the proximate cause of the death of the decedent. The court did undertake to limit this by submitting to the jury the question as to whether or not the device was in an experimental stage of development (R. 148-149, 151) but there was no justification for submitting this question of fact to the jury, since all the evidence showed without dispute that the device was experimental and was not a device in general use, and since it is for the Interstate Commerce Commission to approve and require devices under the Boiler Inspection Act, which it can do only after hearing, on sufficient evidence, and upon sufficient findings of fact. *United States* v. *Baltimore & Ohio R. Co.*, decided Jan. 7, 1935, 293 U. S. (Adv.) 454, *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521.

In petitioner's motion for new trial error was assigned on the portion of the charge dealing with this device and with the Boiler Inspection Act, upon the grounds that the use of the device was not required by the Boiler Inspection Act or the rules and regulations promulgated by the Interstate Commerce Commission, that the Act was inapplicable and in no way pertinent, and other similar grounds. (R. 121 *et seq.*)

5.

Questions Made in Court of Appeals.

It will thus be seen that by exceptions to the overruling of its demurrer, by answer and by assignments of error to the charge of the trial judge, the questions presented in this petition were fully and clearly made in the trial court and in the Court of Appeals of Georgia.

6.

Decision of Court of Appeals.

In the judgment of the Court of Appeals (R. 155, and especially in the 4th, 5th, 6th, 9th, 11th, and 12th divisions of the opinion), now sought to be reviewed, that court held

flatly that the Boiler Inspection Act applied in the case, that the device known as "Wright's Little Watchman" was a part or appurtenance of the locomotive within the purview of that Act, that an absolute duty devolved upon the defendant railway company so to maintain the device that it would have operated when the front trucks of the locomotive were derailed, and that a failure to operate authorized a recovery by respondent. The effect of that decision is that anything actually used on a locomotive is a part or appurtenance thereof within the meaning of the Act, regardless of the character or purpose thereof or of whether or not it is specified in the Act or in the rules and regulations of the Interstate Commerce Commission promulgated in accordance with the Act.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

1. The undisputed evidence is to the effect that "Wright's Little Watchman" will operate only when conditions develop that will bring the bracket in contact with the trigger, that it cannot be relied upon to operate at all times and under all conditions when the front trucks of a locomotive become derailed, that actual experience has shown that sometimes it will operate and sometimes it will not; that occasionally it will operate and stop a train when the trucks are not derailed; and generally that it is an uncertain experimental device not in general use on railroads (Goff's cross-examination, R. 86, and Madden's testimony, R. 96).

2. No such device, either by name or description, is required or even mentioned in the Employers' Liability Act, the Safety Appliance Acts, the Boiler Inspection Act, or the rules and regulations of the Interstate Commerce Commission promulgated in pursuance thereof. This Court will doubtless take judicial cognizance of these rules and regu-

lations, but if not, this fact is shown by the undisputed testimony of Mr. Madden (R. 96).

3. The Boiler Inspection Act, 45 U. S. C. 23, provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

That Act applies only where the use of a part or appurtenance would cause unnecessary peril to life or limb unless it was in proper condition and safe to operate; and does not apply to the use of a device which could not possibly endanger the locomotive or anyone on the train, but might possibly add to the safety of the train if the conditions developed which would cause it to operate. It applies only to such parts and appurtenances as are required to be inspected in accordance with the provisions of the Boiler Inspection Act, and to meet the tests prescribed in the rules and regulations promulgated by the Interstate Commerce Commission in accordance with the Act; and does not apply to a device not required to be inspected or tested.

4. The Boiler Inspection Act merely requires a condition which will permit use of the locomotive "without unnecessary peril to life or limb." *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521.

5. Unless specified in the Act, the rules and regulations prescribed by the Interstate Commerce Commission fix the standard. *United States* v. *Baltimore & Ohio R. Co.*, decided Jan. 7, 1935, 293 U. S. (Adv.) 454; *United States* v. *Southern Railway Co.*, 1 F. (2d) 487.

6. If the device had never been applied to this locomotive at all, the locomotive would have fully complied with all requirements of federal law, yet the fatal accident would have occurred just the same. With the device actually applied, but failing to act to set brakes on the particular occasion, the locomotive was in exactly the same condition of safety as if the device had never been placed on it, and as fully complied with all federal safety requirements. The presence of the non-operating device in no way influenced the chain of causation. Yet liability has been imposed upon petitioner merely because it vainly attempted to do more than the law requires as to safety, whereas if it had not made such attempt there would have been no liability under federal law.

7. The Court of Appeals of Georgia erred in holding that the device known as "Wright's Little Watchman" was a part or appurtenance of the locomotive within the scope and purview of the Boiler Inspection Act and that the use of such device on the locomotive imposed upon petitioner the absolute duty of maintaining same in such condition that it would always operate in case of a front truck derailment and in holding that the failure of the device to operate on this particular occasion was a violation of such duty; and, in so holding, the Court of Appeals of Georgia misinterpreted and misapplied said Act.

8. The holding of the Court of Appeals of Georgia to the effect that the device known as "Wright's Little Watchman" was a part or appurtenance of the locomotive in question within the meaning and purview of the Boiler Inspection Act and that by reason of the use thereof there devolved upon the petitioner an absolute duty to maintain it in such condition that it would operate on all occasions and under all circumstances when the front trucks of the locomotive became derailed, was a decision upon federal questions of substance not theretofore expressly determined by this Court, but in a way, as petitioner insists, that is probably not in accord with the applicable decisions of this Court, and was a decision upon important questions

of federal law which have not been, but should be, settled by this Court, for each and all of the reasons hereinbefore specifically set forth.

9. The principle of the decision by the court below is of large public importance. That decision, if allowed to stand, would tend to prevent or deter railroads from experimentation to develop new safety devices, and such experimentation is necessary to enable the development of such devices in the interest of public safety to a point of perfection where they may be approved and required by the Interstate Commerce Commission as necessary devices under the Boiler Inspection Act.

WHEREFORE, because said Court of Appeals of Georgia, in its decision and judgment, misinterpreted and misapplied the Safety Appliance Acts, and particularly the Boiler Inspection Act, hereinbefore specifically referred to, and, in so doing decided the federal questions involved erroneously, because said Court of Appeals of Georgia denied petitioner's application for rehearing, and because the Supreme Court of Georgia denied petitioner's application for writ of certiorari, your petitioner, upon this petition, upon the annexed brief, and upon the certified transcript of the record of all proceedings in the Court of Appeals of Georgia and of the denial by the Supreme Court of Georgia of petitioner's application for writ of certiorari, prays that a writ of certiorari be issued by this Court to the end that said cause may be reviewed and determined by this Court as provided by law, and that upon such review the said judgment and decision of the Court of Appeals of Georgia be reversed.

SOUTHERN RAILWAY COMPANY,
By G. E. MADDOX,
H. O'B. COOPER,
SIDNEY S. ALDERMAN,
Attorneys for Petitioner.

S. R. PRINCE,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No.

SOUTHERN RAILWAY COMPANY, *Petitioner,*

v.

MRS. OLIVIA COX LUNSFORD, as Administratrix of Estate of J. M. COX, Deceased, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals of Georgia has not yet been officially reported, but will be found in 179 S. E. 171. A copy of that opinion will be found in the record, beginning at page 155.

II.

JURISDICTION.

The date on which the judgment sought to be reviewed became final was the 29th day of May, 1935.

The jurisdiction of this Court is invoked on the ground that petitioner, in the courts below, claimed immunity from liabilty and asserted rights under the Federal Employers' Liability Act, 45 U. S. C. 51-59, and under the Boiler Inspection Act, 45 U. S. C. 22-34, statutes of the United States, which claims and rights were denied, and that petitioner has not heretofore had opportunity to submit said claims and rights for adjudication to any federal tribunal, jurisdiction being therefore invoked under Judicial Code, Section 237, as amended, 28 U. S. C. 344 (b).

Some of the cases believed to sustain the jurisdiction of this Court are:

Northwestern Pacific R. Co. v. *Bobo,* 290 U. S. 499;
Atchison, T. & S. F. R. Co. v. *Saxon,* 284 U. S. 458;
Atchison, T. & S. F. R. Co. v. *Toops,* 281 U. S. 351;
Chicago, M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472;
Virginian R. Co. v. *Mullins,* 271 U. S. 220, 222;
Fullerton-Krueger Lumber Co. v. *Northern Pacific R. Co.,* 266 U. S. 435;
American Ry. Exp. Co. v. *Levee,* 263 U. S. 19;
Andrews v. *Virginian R. Co.,* 248 U. S. 272;
Cuyahoga River Power Co. v. *Northern Realty Co.,* 244 U. S. 300.

The petitioner properly prays that the writ be directed to the Court of Appeals of Georgia, it appearing that the Supreme Court of Georgia declined to exercise its discretion to entertain an application for writ of certiorari (R. 166), and that it is the decision and judgment of the Court of Appeals of Georgia which is brought under consideration by the petition to this Court for certiorari.

Davis v. *Cohen & Co.,* 268 U. S. 638;
Central New England Ry. Co. v. *Boston & Albany R. Co.,* 279 U. S. 415.

III.

STATEMENT OF THE CASE.

The accompanying petition for the writ of certiorari briefly and concisely states the relevant facts. References to the facts will be made and repeated in the body of this brief only in so far as the same may be necessary in the discussion of the questions involved.

IV.

SPECIFICATION OF ERRORS.

The errors assigned and relied on by petitioner are the following:

1. That the Court of Appeals of Georgia erred in affirming the judgment of the court below in overruling defendant's demurrers, paragraph 10 (a), (b), and (d), to the first count of the petition (R. 25-26), which are as follows:

> "(a) That the averments thereof with respect to the watchman and the description thereof, and the manner in which it is claimed it would operate, or (are) insufficient, vague, and indefinite, and fail to put this defendant upon notice of how or in what way it was claimed there was any negligence with respect thereto.
>
> (b) That there are no averments showing or tending to show that said watchman was an appliance or safeguard required under the Federal Safety Appliance Acts of Congress, nor is there any averment showing or tending to show that the same was in customary and general use on first class railroads, nor is there any averment showing or tending to show that the same would, in all cases, operate or function when the front truck wheels of an engine left the track.
>
> (d) That there are no averments showing or tending to show any duty on the part of the defendant to have or use said watchman on its engine or to keep the same in repair; and in the absence thereof, the condition thereof, and its failure to operate are wholly immaterial and irrelevant, and are not negligence on the part of this defendant,"

and erred in affirming the judgment of the Court below in overruling demurrers in the same language to the second count of the petition, paragraph 7, (a), (b), and (d), (R. 29-30).

2. That the Court of Appeals of Georgia erred in affirming the verdict and judgment of the court below and in refusing to sustain grounds of exceptions to instructions in the court below submitting in charge to the jury a portion of the Boiler Inspection Act of Congress, as follows, to-wit:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for"

and in instructing them, in substance, that the same was applicable, that the device known as "Wright's Little Watchman" was a part and appurtenance of a locomotive within the meaning of said Act, and that this imposed upon the petitioner the absolute duty to keep and maintain the same free from defects and safe to operate (R. 121-135); and, in passing upon said exceptions, holding, in substance and effect, that said Act was applicable, that the device known as "Wright's Little Watchman" is a part and appurtenance of a locomotive within the purview of the Federal Safety Appliance Acts, requiring a locomotive engine of an interstate railway company and all parts and appurtenances of such locomotive to be in proper condition to operate safely, and that they be kept in that condition, although the appliance is not one that is required by such

Federal laws to be attached to the locomotives of interstate railway companies (R. 159-164, Sections 4, 5, 6, 9, 10, and 12 of the Opinion), the exceptions to such instructions being, in substance and effect:

(a) That these provisions of the Boiler Inspection Act, especially under the evidence in the case, and the instructions applying the same to the use by petitioner of the device known as "Wright's Little Watchman" were wholly inapplicable and in no way pertinent;

(b) That the failure of said "Wright's Little Watchman" to operate would not be negligence on the part of the petitioner as charged by the trial court, and that no absolute duty devolved upon it to keep the same in proper condition and safe to operate in the service, for the reason that no such device was required to be used by said Act, or by any rule or regulation of the Interstate Commerce Commission promulgated in pursuance thereof; and

(c) That the undisputed evidence showed that the device known as "Wright's Little Watchman" in no way imperiled the safety of the train or any person or employee thereon.

V.

ARGUMENT.

THE BOILER INSPECTION ACT IS INAPPLICABLE IN THE PRESENT CASE AND THE COURTS BELOW MISAPPLIED THAT ACT AND WRONGLY IMPOSED LIABILITY ON PETITIONER THEREUNDER.

We do not contend that where a railroad voluntarily installs on a locomotive a device not required by the Commission's rules it would not be liable *under the Employers' Liability Act* for negligent installation or negligent failure to maintain if such negligence should proximately cause injury. That is not this case.

Here there was no evidence that the "Little Watchman" was negligently installed or maintained or that its failure to function on this occasion was due to petitioner's negligence. The nature of the device is such that *res ipsa loquitur* could not apply to authorize a finding of *negligence* upon mere proof of failure to function. What we have here is the imposing upon petitioner of liability as for violation of an *absolute duty under the Boiler Inspection Act,* regardless of negligence or fault, upon the sole basis of proof that the device did not function as hoped on this occasion.

The language of the Boiler Inspection Act here involved, 45 U. S. C. 23, is as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The purpose of this section was, of course, to promote safety in the operation of trains. The keys for determining whether a locomotive is safe to operate within the meaning of that section are found in the words "safe to operate" and "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," and the further provisions as to inspection and the withstanding of tests. We submit that these words in the Act necessarily confine it to (a) the essential parts and appurtenances necessary to safe operation; (b) such parts and appurtenances as are specifically mentioned in the Safety Appliance and Boiler Inspection Acts or in the rules and

regulations promulgated by the Interstate Commerce Commission in pursuance thereof.

We most respectfully insist that the device known as "Wright's Little Watchman" does not fall within any of these classifications, and is not a part or appurtenance of a locomotive within the meaning and purview of the Act.

Without repeating, we refer to the description of the device and of its operation and to the testimony of witnesses Goff and Madden set out in the foregoing petition (pp. 4-5, 9-10). This testimony as to the operation of the device in actual practice is undisputed and shows (a) that its use was not required by any rule or regulation of the Interstate Commerce Commission; (b) that it is in a mere experimental stage of development, that it operates differently on different engines of the same class, operating at times and stopping the train when there is no derailment of the trucks and at some times operating and at other times failing to operate when the front trucks are derailed,—in other words that it is extremely uncertain in its operations and is an unproved, uncertain device which could not be universally relied upon; and (c) that the use thereof on the locomotive could not possibly endanger the operation of the train, but, on the contrary, that it was a super-added safety device, used in the hope that it might possibly operate if the front trucks became derailed.

This testimony clearly demonstrates that the use of this device did not render the locomotive unsafe to operate in the service, and that it could not possibly bring about "unnecessary peril to life or limb".

In Section 4 of its opinion (R. 159), the Court of Appeals of Georgia says:

> "The gist of section 23 of the act of Congress of April 22, 1908, as amended in 1911 and 1915, known as the Federal safety-appliance act, which was passed for the purpose of regulating the liability of interstate carriers, is to make it 'unlawful for any carrier to use * * * any locomotive unless said locomotive, its boiler,

> tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which put', and further that 'said locomotive, its boiler, tender and all parts and appurtenances' must be inspected as therein provided."

This statement, as we insist, illustrates the misconception by the Court of Appeals of Georgia of the provisions of the Boiler Inspection Act. No reference is made or effect given to the all-important words in that statute, "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb." If Congress had intended that any and every device used on a locomotive, regardless of the purpose or effect thereof, should fall within the terms of that statute, it would have stopped with the words "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances are in proper condition and safe to operate in the service to which the same are put." But Congress did not stop there. Congress qualified and limited the foregoing language by adding the words, "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," and by the further provisions as to tests to be prescribed in the rules and regulations to be made by the Interstate Commerce Commission. These latter provisions must have and must be given some meaning and effect. The use thereof must necessarily mean that the provisions of the act were not intended to apply to every device of every kind and character that might be placed on a locomotive. Unless that is the meaning thereof those words are without any meaning whatever and are of no effect; and that seems to be the interpretation given the act by the Court of Appeals of Georgia.

The contention of the petitioner in this case, it seems to us, is clearly recognized and applied by this Court in the case of *Baltimore & Ohio Railroad Company* v. *Groeger*,

266 U. S. 521. In that case the decedent was killed by the explosion of the boiler of a locomotive, and it was contended that the defendant's failure to have a fusible plug in the crown sheet violated the Boiler Inspection Act. The trial judge, in substance, instructed the jury that it was for them to determine whether the standard of duty imposed by this Act required a fusible safety plug to be installed, and, if so, that the absence thereof would impose liability upon the defendant. In passing on this question, this Court said (pp. 529-531):

> "The jury was by the charge authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. *There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs* * * * If the question whether the standard of duty fixed by the act required defendant to have a fusible plug in the crown sheet of the boiler were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. *But we think the question was not for the jury.* * * * The act required a condition which would permit use of the locomotive without *unnecessary* danger. It left to the carrier the choice of means to be employed to effect that result. While the burden was on the plaintiff to prove a violation of the act by defendant, she was not bound to show that any particular contrivance or invention was suitable or necessary to have and keep the boiler in proper condition. There is a multitude of mechanical questions involved in determining the proper construction, maintenance, and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine ten-

> ders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end * * * The presence or absence of a fusible plug was a matter properly to be taken into consideration in connection with other facts bearing upon the kind and condition of the boiler in determining the essential and ultimate question, *i. e.*, whether the boiler was in the condition required by the act. But we think the court * * * erred in authorizing the jury to decide that 'the standard of duty imposed by law required a fusible safety plug to be installed', and that 'the absence of the fusible safety plug would impose upon the defendant here an absolute liability'." (Italics ours.)

We call particular attention to the expressions in that decision as follows:

> "There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs."
>
> *"The act required a condition which would permit use of the locomotive without unnecessary danger."*

In that case, plaintiff's contention was that the statute had been violated for the reason that the boiler was not safe, and that decedent was exposed to "unnecessary peril" because of the failure to use a fusible plug in the crown sheet, and that the explosion would not have occurred had a fusible plug been used therein. This Court expressly rejected the contention that the use of the boiler without a fusible plug therein was, in and of itself, a violation of the statute, but said that the presence or absence of a fusible plug might be taken into consideration "in determining the essential and ultimate question, *i. e.*, whether the boiler was in the condition required by the act", and then added:

> "But we think the court * * * erred in authorizing the jury to decide that 'the standard of duty imposed by the law required a fusible safety plug to be installed', and that 'the absence of the fusible safety plug would impose upon the defendant here an absolute liability'."

We most earnestly insist that the foregoing is in irreconcilable conflict with the holding of the Court of Appeals of Georgia (R. 160, Section 5), that the little watchman "is properly a part and appurtenance of the locomotive within the purview of the Federal safety-appliance laws, requiring a locomotive engine of an interstate railway company and all parts and appurtenances of such locomotive to be in proper condition to operate safely, and that they be kept in that condition, although the appliance is not one that is required by such Federal laws to be attached to the locomotives of interstate railway companies," and similar expressions in the opinion rendered.

As specifically stated by this Court in the *Groeger case*, "the act required a condition which would permit the use of the locomotive without *unnecessary* danger".

Another very pertinent case is that of *United States* v. *Southern Railway Company*, 1 F. (2d) 487, in which the Boiler Inspection Act was under consideration, and in which Judge Hicks, of the United States District Court in Tennessee, said (p. 488):

> "Section 2 of the act provides that 'it shall be unlawful * * * to use any locomotive engine * * * unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.' Section 5 provides for the promulgation of rules and

regulations and inspections, and the rules and regulations material to the issue here are set forth in paragraph 2 of count 1 of the declaration. These rules must be considered as part of the statute. Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

"It is to be noticed that section 2 makes it unlawful to use a locomotive engine unless its boiler is in proper condition and safe to operate, and, of course, there must be some *fixed standard* by which is determined the question as to whether a boiler is 'in proper condition and safe to operate,' and this standard must necessarily be: *Have the rules and regulations been observed? If they have, the engine may be used; otherwise, not.*" (Italics ours.)

In this decision, Judge Hicks very clearly declares the rule that except as to equipment specifically mentioned in the Act itself, the rules and regulations promulgated by the Interstate Commerce Commission, as authorized by the act, fix the standard by which it is to be determined whether or not a locomotive is in proper condition and safe to operate as required by the Act.

We most respectfully submit that the decision and opinion of the Court of Appeals of Georgia in the present case cannot be reconciled with the *Groeger case* and with the decision of Judge Hicks.

Substantially the same ruling was made in the case of *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, in which this Court held that "the power conferred upon the Interstate Commerce Commission by the amendment in 1924 to the Boiler Inspection Act, to prescribe rules to enforce compliance with the requirements that locomotives, boilers, tenders, and all parts and appliances thereof, are in proper condition and safe to operate, occupies the entire field so as to exclude state power to require automatic doors to fire boxes, and cab curtains", and, in the opinion (page 612), occurs the following pertinent statement:

> "The duty of the commission is not merely to inspect. *It is, also, to prescribe the rules and regulations by which fitness for service shall be determined.* Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. *Thus the commission sets the standard. By setting the standard it imposes requirements.*" (Italics ours.)

And at page 613 the Court further said:

> "Because the standard set by the commission must prevail, requirements by the states are precluded, however commendable or however different their purpose. * * * If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it."

In the recent case of *United States* v. *Baltimore & Ohio R. Co.*, decided January 7, 1935, 293 U. S. (Adv.) 454, the language above quoted from the Napier case is quoted and adhered to; and in addition thereto are the following pertinent statements:

> "But the responsibility for rules adequate to insure safety was imposed by Congress upon the Commission", etc., (page 461)

and on pages 462-463, in discussing the necessity for findings by the Commission, this Court said:

> "The railroads contend that to support the order certain basic findings are essential. * * * This contention is in our opinion sound. The act does not confer upon the Commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem desirable. The operation of an engine, however equipped, involves some 'danger to life or limb'. * * * And the act conferred authority to prescribe by rule specific devices, or changes in the equipment, *only where these are required to remove 'unnecessary peril to life or limb'.*" (Italics ours.)

If the Commission is without power to make a rule *requiring* the use of a specific device without a basic finding that the use thereof is "required to remove 'unnecessary peril to life or limb'," then it seems to us it necessarily follows that the voluntary use of a device which from its very nature and as shown by the undisputed testimony could not possibly endanger the operation of the train, and therefore could not possibly cause "unnecessary peril to life or limb", would not be the use of a part or appurtenance of the locomotive within the meaning of the Act.

It also seems to us that our contention as to the proper construction and application of the Act is supported by the language used by the Court of Appeals of Georgia in the case of *Western & Atlantic R. Co.* v. *Meister*, 37 Ga. App. 570, 579, 140 S. E. 905, in which that Court said:

> "However, since there is nothing either in the statute or in any rule of the Interstate Commerce Commission forbidding the link and hook connection, the mere fact that it was used would not amount to an infringement of the law, provided that with it the brake was still efficient."

In the present case the locomotive was "still efficient" and still "safe to operate in the service," whether equipped with "Wright's Little Watchman" or not. If the present case had been exactly as it was except that no "Wright's Little Watchman" had ever been installed on the locomotive, the locomotive would have fully complied with the requirements of federal laws and there could have been no ground for contention that any violation of the Boiler Inspection Act had imposed absolute liability on the petitioner. With the "Watchman" installed but failing to operate on the particular occasion, the locomotive was exactly as safe for operation as if the "Watchman" had never been installed. The only difference was that it had an added safety device, not required by law, which under certain conditions might prevent an accident which would occur to a

perfectly lawful locomotive not so equipped. The decision below imposed liability on petitioner as for violation of the Act merely because this added device failed to prevent an accident which would have equally occurred had the locomotive never been equipped with the device, a case in which there would have been no liability under the law.

We further most respectfully submit that the cases cited by the Court of Appeals of Georgia either support our contention or else are in no way pertinent to the question involved in this case. Some of these cases have hereinbefore been commented on.

Th case of *W. & A. R. Co.* v. *Townsend,* 36 Ga. App. 70, 135 S. E. 439, was based upon a violation of the Safety Appliance Act by reason of using a defective air brake, it not being questioned that an air brake was a part or appurtenance within the meaning of the statute and the rules and regulations of the Interstate Commerce Commission. Really the only question involved in that case was with reference to the damages recoverable in such a case.

The case of *Lehigh Valley R. Co.* v. *Beltz,* 10 F. (2d) 74, is based squarely on the proposition that the condition of the locomotive was such as to make it unsafe to operate in the service to which it was put, and that in the operation thereof "the main pin broke, causing the driving and parallel rods to fly about, disabling the engine and punching a hole in the boiler, causing a violent emission of steam, hot water, and coals of fire into the cab," causing those on the engine to jump in an effort to save their lives, and that the decedent was killed. That was squarely a case where a part or appurtenance of the locomotive, necessary to its safe operation, was defective. It was not, as in this case, an unnecessary device which might possibly increase but could not possibly impair the safety of the operation or use of the locomotive.

The case of *Wyatt* v. *N. Y., etc., R. R.,* 45 F. (2d) 705, involved the failure to provide a rear light on a yard engine as specifically required by the rules and regulations of the

Interstate Commerce Commission adopted pursuant to the Boiler Inspection Act of Congress.

In the case of *Fredericks* v. *Erie R. Co.*, 36 F. (2d) 716, involving the use of a pet-cock on a locomotive, a recognized necessity thereon, two theories were relied upon,—one that the pet-cock was insecurely fastened, and the other that it was improperly located on the engine. The plaintiff was injured while attempting to use this pet-cock. The court held, in substance, that if the pet-cock was improperly fastened it was a violation of the act, but that its location was a matter in the discretion of the railroad company and was not a violation of the act. No question was made in that case that the pet-cock was not an appliance within the meaning of the act.

The case of *Hines* v. *Smith,* 275 Fed. 766, involved a defective condition in and the failure to operate of an automatic bell ringer. The facts of the case show that the hand bell ringer operated from the fireman's side of the engine, and that the fireman was not on the train at the time of the accident. The court pointed out that the engineer was compelled to remain on his seat in order to run the engine, and that he could not leave it in order to operate the hand bell ringer. The liability imposed in that case was because of the failure to ring the bell, as a result of which another employee in the yard was not warned of the approach of the engine and was injured as a result thereof. The necessary inference from that decision is that the only thing necessary was that the bell be rung, either automatically or by hand. The decision is not predicated upon the failure to provide an automatic bell ringer, but because the bell was not rung in some way. A bell is a fixed appliance and is a necessary part of every engine for its safe operation. The placing and ringing thereof under stated conditions is required by the law of Georgia and the laws of every other State with which we are familiar. A bell will ring whether the power be applied automatically or by hand. A bell is a recognized part of every engine, sure in

its operation. That case is in no way pertinent to the question involved in the case at bar.

Without going into detail with respect thereto, we submit that a careful reading of every decision cited by the Court of Appeals of Georgia will show that the instrumentality involved was a necessary part of the equipment of the locomotive or boiler, was a proven device which would always operate when in proper condition, and without which the locomotive would be unsafe to operate. All of those cases are clearly differentiated from the present case, where the instrumentality involved is purely experimental, unperfected, unproved and uncertain in its operation; is in no way a necessary part of a locomotive, performs no function in the normal operation thereof, cannot possibly affect or in any way increase the hazard in operating it, but is used solely in the hope that it may possibly operate and may possibly avert a casualty in the event the front trucks of the locomotive become derailed by some other cause.

If, as we insist, this device known as "Wright's Little Watchman" was not a part or appurtenance of the locomotive within the meaning and purview of the Boiler Inspection Act then the instructions of the trial judge giving this act in charge to the jury, instructing that it placed upon the defendant an absolute duty to maintain the device in proper working order, and that a failure of the device to operate would be a violation of the act and impose liability upon the defendant railway company, were highly prejudicial and harmful to the defendant railway company, and, in effect, instructed the jury that the defendant was liable and that their only duty was to fix the amount of the damage.

Under the practice in Georgia, in a case of this character, specific questions are not submitted to the jury for answer but merely a general verdict is rendered. Therefore, any error in the instructions necessarily entered into the rendition of any verdict by the jury.

In this case petitioner has been unjustly penalized because it undertook to do more than federal law required as to safety of its locomotive, because it applied a device not required, a device which, under certain circumstances, might operate to achieve a higher standard of safety than the law demands but could never operate to lower safety below the standard fixed by law, and liability has here been imposed upon petitioner because the device on the particular occasion did not succeed in achieving the possible standard of safety higher than the law requires but left the locomotive in precisely the same condition of safety as if the device had never been applied; that is, a condition of full and complete compliance with all requirements of federal law.

CONCLUSION.

For the reasons assigned in the petition for certiorari, and because of the facts and the law set out in this brief accompanying said petition, we most respectfully submit that the writ of certiorari should be granted, and that, after full consideration by this Court, the judgment and decision of the Court of Appeals of Georgia herein should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 399.

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

MRS. OLIVIA COX LUNSFORD, as Administratrix of the Estate of J. M. COX, Deceased, *Respondent*.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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v.

MRS. OLIVIA COX LUNSFORD, as Administratrix of the Estate of J. M. Cox, Deceased, *Respondent*.

SUPPLEMENTAL BRIEF FOR PETITIONER.

Respondent's main brief has been filed somewhat in advance and copies were furnished us in advance of filing. Accordingly, this brief is in the nature both of a supplemental brief and of a reply to respondent's main brief.

We do not here repeat the formal and jurisdictional parts already set out in the brief in support of petition for certiorari.

Jurisdiction Not Affected by the Fact That There Were two Grounds Found to Support the Judgment Below. Both are Federal Grounds.

Respondent's brief in opposition to certiorari (pp. 1-2, 10) and her main brief (pp. 2, 10) seem to lay considerable stress on the fact that the trial court, affirmed in both respects by the Court of Appeals, submitted the case to the jury on two different causes of action: first, a cause based on alleged negligence, under the Federal Employers' Liability Act, in maintenance of track and roadbed; second, a failure of Wright's Little Watchman to stop the train after the derailment of the front truck as constituting a violation of the Boiler Inspection Act* imposing absolute civil liability on respondent as for violation of an *absolute duty* imposed by that Act.

What conclusion respondent would draw from this duality of causes or theories of the action it is difficult to discover. It would seem that respondent, without invoking it expressly, is seeking to suggest the application of the well settled rule of this Court that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, jurisdiction of this Court fails *if the non-federal ground is independent of the federal ground and is adequate to support the judgment. Fox Film Corp.* v. *Muller,* decided Dec. 9, 1935; *McCoy* v. *Shaw,* 277 U. S. 302; *Petrie* v. *Nampa & M. Irrig. Dist.,* 248 U. S. 154; *Enterprise Irrig. Dist.* v. *Canal Co.,* 243 U. S. 157, 163-165; *Eustis* v. *Bolles,* 150 U. S. 361; *Klinger* v. *Missouri,* 13 Wall. 257, 263.

But that rule has no application here, for here there was no non-federal ground to support the judgment. All questions here are federal questions. The first cause of action, predicated on negligence, was under the Federal Employers' Liability Act and all questions of negligence, sufficiency

*The Act of February 17, 1911, 36 Stat. L. 913, as amended by the Act of March 4, 1915, 38 Stat. L. 1192, by the Act of June 7, 1924, 43 Stat. L. 659, and by the Act of June 27, 1930, 46 Stat. L. 822—(45 U. S. C. 22-34).

of evidence and proximate causation were federal questions, just as much as were the questions under the Boiler Inspection Act arising out of the second cause of action.

The Questions Under the Boiler Inspection Act Cannot be Disentangled from Those Under the Employers' Liability Act, as Support for the Judgment.

The trial judge (R. 137-139, 140-151) submitted the cause to the jury both on the theory of negligent condition of track as proximately causing the derailment and death and on the theory that the failure of Wright's Little Watchman to stop the train after the initial derailment was a violation of the Boiler Inspection Act and the breach of an absolute duty under that Act, resulting in liability regardless of fault. The jury were authorized by the charge to find a verdict against petitioner on either one or both of those theories. Under the law of Georgia the jury does not answer particular issues or identify facts found or theories of liability applied. The verdict is general, not special. In this case it reads (R. 40):

> "We, the jury, find for the plaintiff in the sum of Five Thousand ($5,000) Dollars."

The result is that no court, no one reviewing the record, can say whether the liability was imposed on a finding that negligent track conditions caused the death or on a finding that a violation of the charged absolute duty under the Boiler Inspection Act was the cause, or whether the jury based its ultimate finding on a combination of the two.

For this reason it is the well-settled law of Georgia that where a case is submitted to a jury on more than one theory an erroneous instruction on one is reversible error even though there was no error in submitting the other, since it cannot be known on which the jury based its verdict. See

Lamb v. *Perry*, 18 Ga. App. 133, and cases cited in footnote below.*

Under this settled law of Georgia, had the Court of Appeals of Georgia agreed with petitioner that there was error in charging the federal law under the Boiler Inspection Act, on the Wright's Little Watchman branch of the case, it would undoubtedly have reversed and granted new trial in spite of its holding that there was sufficient evidence to support the verdict on the branch asserting negligent track conditions. In *Lamb v. Perry, supra*, where a suit was brought on two counts, the judgment was reversed because the lower court erred in submitting one of the counts and because reversal was necessary for the reason, as the court said, "that it cannot be ascertained upon which count of the petition the recovery was based."

This was not done here because the Court of Appeals below held there was no error as to either branch of the case.

We think our questions here raised under the Boiler Inspection Act are meritorious. There can be no doubt that they are adequately raised.

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*Thus, where a statute is charged which the evidence shows to be inapplicable, it is generally held to be calculated to mislead and confuse the jury and to require a new trial. *Mitchell* v. *Langley*, 148 Ga. 244; *Blackwell* v. *Partridge*, 156 Ga. 119 (5), 130-131.

Where instructions are given not warranted by the evidence and calculated to confuse and mislead the jury, the error requires a new trial. *Central Ga. Power Co.* v. *Cornwell*, 139 Ga. 1 (2-a).

Instructions which under the evidence are inapplicable are erroneous and require the grant of a new trial. *Boyd* v. *Boyd*, 173 Ga. 139; *May et al.* v. *Leverett et al.*, 167 Ga. 205 (5); *Sapp* v. *Odom et al.*, 165 Ga. 437 (5-8); *Mobley* v. *Merchants & Planters Bank*, 157 Ga. 658 (3); *Ward* v. *The State*, 39 Ga. App. 570; and many other cases.

No instructions should be given upon any theory which is unsupported by the evidence: *Burley* v. *The State*, 158 Ga. 849; *Betts* v. *The State*, 157 Ga. 844; *Louisville, etc., R. Co.* v. *Pounds*, 50 Ga. App. 611 (1).

If, by the giving of inapplicable instructions, the jury might reasonably be drawn away from the true issues in dispute, to the prejudice of a party, the error is not harmless and a new trial should be granted. *Commercial Bank of Jasper* v. *Dasher*, 24 Ga. App. 736.

Where an issue, though raised by the pleadings, is not supported by the evidence, it is error to charge thereon, and a new trial should be granted. *Investors Syndicate et al.* v. *Thompson et al.*, 172 Ga. 203, 204.

There was No Substantial Evidence that Negligent Track Conditions Existed or that Such Conditions Proximately Caused the Death.

There is no disagreement between the parties as to the fact that the initial derailment of the front truck wheels occurred just opposite the negro church and just after they struck the rock placed on the track by the nine year old negro child, that the locomotive continued for seven-tenths of a mile with the derailed front truck wheels striking the cross ties from time to time, that there was nothing unusual in noise or feeling in the operation to indicate to any one on the train that the front truck derailment had occurred until the locomotive reached the first left hand switch near Bremen (R. 46), that a noise was heard by the fireman at the left hand switch and that momentarily thereafter the final derailment was caused by the derailed truck wheels (which had derailed to the right of the rails) striking the right hand switch.

Manifestly unless some negligent track condition at the point of initial derailment contributed to cause the initial front truck derailment, or unless some such condition at the point of final derailment contributed to that derailment, then track conditions played no role in the causation. No condition of track between these points, even if negligent, could have been a cause of the casualty, because at all such intervening points the initial derailment had already occurred and the final derailment was not caused until the derailed truck wheels struck the switch. All other wheels of the train had safely ridden the rails from the one point to the other.

It is readily demonstrable that there was no substantial proof sufficient to support a finding that any defective condition of track caused either the initial derailment or the final derailment.

After introducing the testimony of the witness Orr, the photographer, who merely testified to the taking of the

photographs on April 14, 1933, two months after the accident, and that they were correct (R. 42-44), the respondent offered as witness Goree, the fireman (R. 45-54). He gave no testimony as to the condition of the track at the point of initial derailment or of any examination made by him there. As to track condition at the point of final derailment he testified that that derailment completely tore up the track at that point. He said (R. 48):

> "That engine, when it left the rails, as to how it behaved, if you have ever ridden in a wagon over cotton rows where the mules were running, it was just about like it; we were dragging up the rails and cross-ties and everything, so you can just imagine how bad it was."

The photograph Exhibit B (R. 100), offered by respondent, illustrates the track at the point of initial derailment as photographed April 14, 1933 (R. 42), two months after the accident, which happened on February 14, 1933 (R. 7, 45). The photograph shows a track and roadbed in good condition and evidences no condition which could have contributed to the derailment.

Respondent's witness Lunsford, son-in-law of the deceased, gave the principal testimony relied on as to track conditions (R. 54-61). The accident happened on Tuesday, February 14, 1933, and he went to examine the track the following Sunday (R. 54). He saw the mark on the rail opposite the negro church where the flange of the right truck wheel mounted the right rail, effecting the initial derailment, and he saw where the wheels hit the crossties. He saw the smudge on the rail that looked like the flange was running on the rail for about three feet before it got off (R. 55). He gave no testimony as to any defective condition of the track discovered by him at either point on that visit.

This witness then revisited the scene in company with Orr, the photographer, he says on April 10, 1933 (R. 55),

Orr says on April 14 (R. 42). In any event it was about two months after the accident. Lunsford figured largely in the photographs, pointing out the point of initial derailment (R. 102), pointing to marks made by the wheels on the crossties between the two derailment points (R. 104, 106, 113, 114, 115), pointing to a spike not driven entirely down, the location being on the outside of the right-hand rail of the passing track where the final derailment occurred (R. 108).

The track was completely torn up at the point of final derailment, as testified by the fireman, *supra.* The photograph, Exhibit R (R. 116), offered in evidence, shows the locomotive lying on its side, taken just after the accident and before the wreck was cleared. It shows indisputably the condition of the track at the point of final derailment just after the occurrence. Rails and crossties were scattered in every direction and the track was destroyed as a track. The track had to be completely rebuilt thereafter, before railroad operations could be resumed, and it was a subsequently built track (at the point of final derailment) which Lunsford examined and in which he found a spike or spikes not driven down. This, of course, has no significance as to what the condition was prior to and at the time of the accident. It was probably the result of haste in relaying the track to put it into operation after the wreck.

The only testimony of the witness Lunsford seeking to show any defective track condition anywhere near the point of initial derailment (R. 55-56) was his testimony in connection with photograph referred to by him as No. 4 (Exhibit E, R. 103) and described by him as being a close-up photograph of three crossties at the point of initial derailment. Although he admitted on cross-examination that he had never had any railroad experience and that he didn't "know a thing in the world about railroad construction," that he had never paid any attention to any railroad track conditions anywhere else (R. 59), that he had never had any experience in determining what was a good sound tie

(R. 60), yet, on direct examination, he undertook to give detailed criticism of two of the three crossties shown in the said photograph, taken two months after the accident. He said (R. 55-56):

> "Those two ties looked like they were pretty badly obliterated and rotten, bursted and marked with the wheel. The left-hand tie looks like the spike came right in that split in the tie. The wood of the tie is missing from under the spikes; there is not but one spike in it and it is missing from that; I mean the plates—it is missing from the whole (hole) on the other side. The rail rests on the plates. There is one spike on the outside in those plates. There is a hole from (for) another spike there; there was one spike missing from every plate. In this picture No. 4, the right-hand ties, there is one spike on the left to the place that joins that tie. As to there being any wood for it to catch in, the spike might catch, but very little, down at the sharp point."

That is the whole of his effort to criticise track conditions attributed to the point of initial derailment. It consisted of finding, two months after the accident, two crossties with worn ends, one of which had a split about where the outer spike went in, and of finding a uniform practice, as shown by this and the other photographs, and as testified by him, of putting one spike instead of two in each tie-plate on the outside of the rail.

There are several conclusive reasons why this was no evidence at all to support a finding that track conditions in any way caused the initial derailment.

First. The crossties referred to were not at or before the point of initial derailment but between that point and the point of final derailment. The scar made by the derailed front truck wheel is apparent on each of the three crossties in the photograph and the witness called attention to the wheel mark on them. The initial derailment had occurred *before the locomotive reached these crossties,*

the whole train passed safely over these crossties and this part of the track. Track conditions here photographed and described could not possibly have had any connection with either initial or final derailment.

Second. There was no effort to show that the rails were not in place or that there had been any spreading of rails at this point. The contrary is conclusively established because the rails on these crossties not only carried safely the train involved in the accident but had been carrying trains in daily operation of this main line track for two months subsequent to the accident.

Third. The practice of using only one spike on the outside of the tie-plate was uniform, standard and proper practice on this railroad. Mr. Madden, General Superintendent of petitioner, testified, and there is no dispute of his testimony on the record (R. 94-95):

> "At the point of derailment, the rails sat on tie-plates and these plates are spiked to the tie. These plates have two openings on each side of rail and there is one spike driven into the tie on each side of the rail. The other openings in the tie-plate are there to be used in the event of any wearing of the other openings. This method of spiking is used on all lines of the Southern Railway Company and is amply sufficient to hold the rail securely and steadily to ties at point of derailment. * * * At the point of derailment, and on each side thereof for a considerable distance where I made a personal inspection thereof, the ties were sound and the spikes were securely driven into the ties up to the head and were holding firmly. There was no looseness or vibration in the rail at point of derailment. In other words, I found the track at point of derailment and all in its immediate vicinity where I made personal inspection in first-class condition and as good as at any point on Southern Railway Company lines, or on any other railroad with which I am familiar.
>
> "In this connection, I might state that this particular piece of track where derailment occurred was rebuilt in 1931, and 100-lb. rail placed on it with first-class ties, tie-plates, spikes, etc., incident to its con-

> struction. In my opinion there was nothing in the conditions of the track at point of derailment which could possibly have caused or contributed to a derailment of the engine. The foregoing examination of the track conditions were made on the afternoon of the day of the derailment and no changes were made in the track, and the train which I went to Bremen on passed over this piece of track, as did all other trains. This derailment caused no damage to the track at point of derailment, and made no repairs of any kind necessary at that point."

Witness Madden, an expert railroad man, was testifying to a personal, official inspection of the very point of initial derailment and a considerable distance on each side thereof, made the afternoon of the wreck. Witness Lunsford, who knew nothing about railroad track conditions, was testifying about conditions on two crossties not at or before the point of initial derailment but at a place between that point and the point of final derailment, a place at which the front truck wheels were already off the track and scarring the crossties.

All the other testimony of witness Lunsford as to observation of track conditions was concerning either (1) points on the track between the point of initial derailment and of final derailment, showing marks on the crossties of the derailed truck wheels (R. 56, 57-58), or (2) conditions at the point of final derailment observed two months after the accident and on track rebuilt thereafter, where the final derailment had completely demolished the track as it had existed before and at the time of the accident (R. 56 bottom 57 top). Nothing in this could have been probative to dispute the testimony of General Superintendent Madden or to support a finding that any defect in track condition contributed to or proximately caused either initial or final derailment.

Respondent then offered the testimony of Holcombe, a deputy sheriff. He saw the pile of sand rock crushed on

the rail, two handfuls of it, the mark where the flange mounted and scarred the rail after hitting the rock and then the mark some distance further where the flange hit the crossties. He traced marks on crossties from that point on (R. 62). He made his examination of ties some time in December, before Christmas, 1933, *ten months after the accident,* and only a month before the trial (R. 64). His only testimony as to track conditions, attempting to suggest any defect at either the point of initial derailment or at the point of final derailment, was the following (R. 63):

> "The cross-ties, as I remember, was practically rotten. They were partly rotten at the church and near this place."

That had no probative value to support a finding that defective track conditions on February 14, 1933, had anything to do with either derailment.

He did see the point of initial derailment on the day of the accident, when he was looking for and found footprints of the boy who put the rock on the track, evidently in pursuit of his duties as deputy sheriff, but the only observation he made at that time was (R. 65):

> "Up at that point of the initial derailment, immediately in front of the church, the track was in no way disturbed up there, out of place or anything of that sort. There was no ties knocked out of place. The only thing I noticed was the imprint of the wheel on the outside of the east rail, and on the inside of the west rail there was some imprint there on the ties."

He did see the overturned locomotive at the point of final derailment on the day of the accident but his only observations at that time were (R. 65-66):

> "Where the engine turned over was up at the right-hand switch. The track was torn up where the train was lying. * * * The rails underneath that engine were torn loose from the ties on the outside, and the ties all thrown in every direction. There were a number of

> cars of the passenger train off the track, and they had twisted and torn the track back there. * * * But I think the only place that the track was torn up was down on the right-hand switch and in that immediate vicinity some seven-tenths of a mile from the point where the trucks were initially derailed. * * * Of course, right where this engine turned over the track was all torn up and for some distance back. I don't think it extended back west of that right-hand switch; my recollection is that it didn't."

Respondent then offered the testimony of Mrs. Lunsford, daughter of the deceased engineer. She testified about her father but nothing about track conditions (R. 66-69).

Respondent then offered the testimony of Cox, the son of the deceased engineer. After testifying about his father's earnings and contributions he testified as to rocks he had found near the point of initial derailment and gave his theory that a rock would not cause a derailment. He gave no evidence as to track conditions (R. 69-74).

Witnesses Goff (R. 74-87), Davis (R. 87-89), Dowdle (R. 89-91) made no examination of the track and gave no testimony regarding it. The nine-year old negro boy, Lowe, testified that he put a rock as big as a man's hand on the track, when he heard the train coming, and stood by to watch the train mash it, and that he saw the front truck wheels off the track after the rock was struck. He of course gave no testimony as to track conditions (R. 91-93).

The only other witness was petitioner's witness Madden, whose testimony as to track conditions we have quoted above.

The foregoing review covers all the evidence in the record regarding track conditions. We submit that it fully supports the statement on petition for certiorari (pp. 6-7):

> "There was some slight evidence in respect thereto (alleged insufficiencies and defects in the track), though the overwhelming weight of the evidence showed that no such insufficiencies or deficiencies existed, or, if they

did exist, that they in no way proximately caused or contributed to the derailment of the front trucks of the locomotive."

We have gone thus fully into this evidence also because it supports the statement on page 3 of petition for certiorari that the evidence shows conclusively that the *causa causans* of the tragedy was the mischievous act of the negro child in placing the rock on the track, and further because it demonstrates that the jury must have based the verdict largely, if not entirely, on the failure of the Wright's Little Watchman to stop the train and prevent the final derailment and on the charge of the trial court imposing absolute duty on petitioner under the Boiler Inspection Act.

The Evidence is Conclusive That the Rock Caused the Initial Derailment and that the Final Derailment was the Proximate Result and Sequence.

It is somewhat surprising to us that respondent should, at this stage of this case, suggest (Main Brief 28) that the testimony of the little negro boy, that he put a rock on the track to see it mashed and that in a few feet after passing over it the front wheels left the track, was false, that the jury disbelieved it, or that it was improbable that the rock could have caused the initial derailment.

Respondent herself, in the second count of her petition (R. 12) alleged that a rock or other object was placed on the track, that the front trucks of the engine struck a rock or other object, and that "upon striking said rock the said front trucks were derailed." She alleged that petitioner was negligent in allowing said rock or other obstruction to be on the track, that the rock had remained on the track for upwards of an hour before this train passed, and that the section foreman was negligent in not finding it.

When the proof came in and showed that the boy only placed the rock on the track when he heard the train coming, the theory of negligent failure to discover and remove the

rock went out of the case and was no further pressed but respondent's own averment that the rock caused the initial derailment remained in the case.

Petitioner, in answer (R. 19), alleged that the front trucks of the engine struck a rock, which had been placed on top of the outside rail on a curve by some miscreant without petitioner's knowledge or consent and just a short while prior to the arrival of the train, and that the rock derailed the front trucks.

Respondent's witness Lunsford testified to the wheel mark on the rail where the wheel mounted it in derailing (R. 55, 59).

Respondent's witness Holcombe, the deputy sheriff, found the "pile of sand rock, crushed on the rail, practically in front of the church, where the train derailed." He said there was not more than two handfuls of the crushed rock (R. 62). He referred to this as "evidences of a crushed rock" (R. 64). He testified that it "was one of these hard, smooth sand rocks" such as you would pick up in a stream (R. 64) and that the amount of ground up rock found by him indicated a rock of such size as an inch and a half thick, maybe two inches wide, and three or four inches long (R. 65). He found footprints, said it had been raining, was muddy, and that he found the footprints leading to the track and away from the track (R. 65).

Respondent's witness Cox, son of the deceased engineer, only visited the scene on Thursday before the trial (R. 70), and the trial was on January 16, 1934 (R. 3), eleven months after the accident. He testified that on that occasion he picked up some other rocks in the vicinity, took them home and hit one with a hammer and it pulverized into sand (R. 70). He had had some railroad experience fifteen years before (R. 69). He testified that he had known trains to run over rocks without derailing and that he had never heard of a rock of any kind knocking a train off a track. He expressed the opinion that a train would crush a rock into

sand and suggested that railroads use sand on tracks to keep the engine from slipping when starting. He suggested that if a wheel should not crush a rock it would knock the rock off the track (R. 71). There was no probative force in this opinion evidence in view of the undisputed evidence of respondent's own witnesses that the rock was struck and crushed and that the physical evidence showed that the front truck wheels were derailed immediately thereafter. On cross-examination this witness of course admitted that he knew nothing whatever about the rock that the train actually struck (R. 73).

The negro boy's testimony is undisputed (R. 91-93). He put the rock, as big as a man's fist, on the track when he heard the train coming, watched to see the train mash it, and saw the front truck wheels go off after they struck it. When the officers came to his house he ran, they measured his track where he ran, they caught him and he confessed and was taken to the "calaboose" (R. 93).

General Superintendent Madden observed the fragments of crushed rock on either side of the rail and testified that, at a point a few feet therefrom on the way to Bremen, the direction in which the train was going, were the first indentations of the wheel flange on the ties. He traced these indentations from that point to the point of final derailment (R. 94). He testified, as hereinbefore quoted, that the track, at and for a considerable distance on both sides of the point of initial derailment, as inspected by him the day of the accident, was in first class condition, tie-plates well spiked, rails secure and steady and with no looseness, movement, vibration or spread, that nothing in the condition of the track could possibly have caused or contributed to the derailment, and that no repairs were necessary after the accident at the point of initial derailment and petitioner's trains continued to operate thereafter over that part of the track without any repairs.

From all the evidence in the record it is inescapably cor-

rect, as stated in petition for certiorari (p. 3), that the evidence conclusively show that the *causa causans* of the tragedy was the mischievous act of the negro child, over whom petitioner had no control and for which petitioner is not responsible. The natural sequence of the initial derailment, undiscovered and undiscoverable by the engineer and fireman, was the striking of the derailed wheels on the rail of the right-hand turnout to the passing track when the engine reached that point running at the usual speed of 40 to 45 miles an hour (Goree, R. 47, bottom).

The State of the Record as to Wright's Little Watchman.

In this state of the record there was no basis for a finding that any track defect caused or contributed to either the initial or the final derailment or to the death of the engineer. On the contrary, it was conclusively shown that the act of the outsider in putting the rock on the track was the cause of the tragedy. To recover, it was necessary for respondent to find some element of liability on petitioner's part *after* the initial derailment and *before* the final derailment. Since track conditions between initial and final derailment could have had no causal effect, and since there was no evidence of any track defect at the point of final derailment which entered or could have been a part of the chain of causation, respondent was forced to rely for recovery practically entirely on the theory that the failure of the mechanical Little Watchman to stop the train after the initial derailment and before the final derailment was a proximate cause of the final derailment and of the death of the engineer, involving absolute liability of petitioner, regardless of due care, under the Boiler Inspection Act.

Laying on one side, for the moment, the Boiler Inspection Act, the Safety Appliance Act, 45 U. S. C. 1-21, had no application. The Safety Appliance Act proper does impose absolute duties as to equipping trains with power driving-wheel brakes (Secs. 1, 9), automatic couplers (Sec. 2), grab

irons or handholds (Sec. 4), drawbars of standard height (Sec. 5), secure sill steps and efficient hand brakes, secure ladders and secure running boards (Sec. 11), fixes these safety appliances as standard equipment unless changed by the Interstate Commerce Commission (Sec. 12), provides for penalties for violation of any such equipment requirements (Secs. 6, 13), abolishes assumption of risk as defense when there is such violation (Sec. 7), makes exceptions as to certain necessary movements but without relieving from civil liability to employees (Secs. 13, 14). The ash pan amendment, 45 U. S. C. 17, mandatorily requires ash pans. Sections 15 and 19 give the Commission power to enforce all these safety appliance requirements. And Section 16 (45 U. S. C. 16) makes the safety appliance requirements of Sections 11, 12, 13, 14 and 15 apply to all carriers to which the first nine sections apply and designates the first nine sections as the "Safety Appliance Acts." Section 20 makes the Ash Pan Act apply to receivers of railroads and Section 21 excepts oil burning and electric locomotives, etc., from the ash pan requirement.

These are the Safety Appliance Acts. There is no suggestion in this case of failure to comply with any of these safety appliance requirements. Nothing in the Safety Appliance Acts requires equipment with a Wright's Little Watchman or with any other device or appliance intended to stop a train automatically if and after front trucks are derailed. The Safety Appliance Acts proper had no bearing on this case.

There follows, in the same chapter of Title 45 U. S. C., the Boiler Inspection Act as amended, Sections 22 to 43. We shall analyze that Act below in the argument. For present purposes we point out that that Act also makes no requirement that a locomotive be equipped with a Little Watchman or with any device or safety appliance of similar character or purpose and that no order of the Interstate Commerce Commission made under authority of the Boiler Inspection

Act has required any such device and the inspection rules of the Commission make no provision for inspection or testing of such device.

We have filed with the Clerk for the convenience of the Court twelve copies of the official volume "Laws, Rules, and Instructions for Inspection and Testing of Steam Locomotives and Tenders and Their Appurtenances" and of the official volume containing the Commission's interpretations, rulings and explanations regarding the laws, rules, and instructions. It was impracticable to reprint these official volumes in larger format.

The Little Watchman was not a federal safety appliance required either by the Safety Appliance Acts, the Ash Pan Act, the Boiler Inspection Act, or the rules of the Commission promulgated under the authority of the latter Act. As we shall show, petitioner was in this case subjected to the same *absolute liability* for the failure of that unrequired, voluntary and experimental device to stop the train after the initial derailment as would have been visited on a railroad for a casualty resulting from failure to have an automatic coupler, power brake or secure grab iron as required by the Safety Appliance Acts, or from failure to inspect in accordance with the Commission's rules any device required by those rules to be inspected under the Boiler Inspection Act or failure of such device to meet the test of such required inspection.

1. The Pleadings as to the "Little Watchman."

Respondent's declaration (petition) clearly presented the theory that the rock derailed the front truck wheels but left the rest of the train on the rails, that the engine continued to function apparently normally for seven-tenths of a mile until it reached the right hand switch, that the derailed front truck wheels then struck the switch, turned to the right and caused the final derailment, and that petitioner was liable as for negligence in failing to inspect the

Little Watchman and have it in condition to operate and because the Little Watchman failed to stop the train between the initial and final derailments. There was no allegation that failure of the device so to function was a violation of the Boiler Inspection Act. The suit was brought solely under the Federal Employers' Liability Act. The allegations were (R. 13-14):

> "9. It is alleged that after striking said rock the front trucks left the rails but the engine was not derailed and continued to function apparently normally to the engineer and fireman was (for) a distance of seven tenths (0.7) of a mile, at which point it struck a switch going out to the right from the track and in so striking the switch the front trucks were turned to the right and were obstructed and caused to be thrust under the engine, and this, together with the large axles and wheels of said trucks and its general obstruction in turning to the right on striking said switch, threw the entire engine off the track and caused it to turn over on its side after running about one hundred yards.
>
> "10. Plaintiff further alleges that said engine was equipped with what is called a watchman, which was an apparatus consisting of pipes, iron or steel contrivances, and other apparatus under the body of said engine extending from the back to the front end thereof, and consisting of cylinders, valves and other apparatus, including air, and which automatically, whenever said front wheels of said engine should leave the track, was designed, by means of a valve which was tripped by the derailment of said wheels, to apply the air on the brakes of the entire train, and had said appliance known as a watchman been in repair, the speed of said train at said point would have stopped at a couple hundred yards, which would have been automatic and without any effort on the part of the engineer, but the defendant on said occasion, before said engine left Birmingham, Alabama, failed to properly inspect said watchman to see that the same was in condition to work, and plaintiff alleges that the same was not in working or functioning order at the

time of said derailment and the same failed to apply the brakes as was its design and purpose and as it would have done had the defendant exercised its duty of inspection under the body of said engine and had ascertained that said watchman was in repair before said trip from Birmingham to Atlanta. The same was not the duty of the decedent who had no concern or part therewith. Had the said watchman functioned, the train would have been stopped long before striking said right hand switch and turning over and the life of the decedent would have been saved."

Petitioner's answer answered these allegations as follows (R. 20-21):

"9th. Answering the ninth paragraph of the second count of the petition, this defendant says that its investigation of the condition after the derailment of said engine showed that after the wheels of said truck under the front end of the engine left the rail it ran for a distance of approximately seven-tenths (7/10) of a mile until it reached a switch going out to the right from the main line, at which point said engine was derailed and turned over. Apparently said front wheels of said truck were off the track from the time the same struck the rock as hereinbefore referred to, and apparently when said front wheels struck the switch they were thrown to one side, and derailed and turned over the engine. Except as answered, the averments of said paragraph can neither be admitted nor denied for the want of sufficient information.

"10th. Answering the tenth paragraph of the second count of the petition, this defendant says that said engine was equipped with an experimental device known as 'Wright's Little Watchman,' which was attached to certain apparatus connected with said engine, and which was so designed that under certain conditions the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train. It says that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause tripping of said valve and the application of said brake. It says that the same is merely an experimental device,

which will not operate at all times when said truck wheels leave the track, but will operate only when conditions develop which will trip the same. It says further that said device is not in use on all railroads, and is not required to be used under the Safety Appliance Act of Congress, or any regulations made in pursuance thereof. It says further that it was not part of the duty of James M. Cox to inspect the same. Except as answered, the averments of said tenth paragraph of the second count of the petition are denied."

2. The Evidence as to the Little Watchman.

The fireman, respondent's witness Goree, testified regarding the "Little Watchman":

> "I thought that that engine was equipped with Wright's Little Watchman. I couldn't say that I had examined that one. I have examined some. It wasn't my duty to examine it; but I thought this engine was equipped with it. I have been on an engine where that Little Watchman worked when the engine got off. That was turning in on Y's, and places like that where the curves are pretty stiff. When it works it opens the air to the atmosphere just like—opens the valve, putting the brakes in emergency just like putting them on from the engine." (R. 48-49)
>
> "A few times in my runnning I have seen that Little Watchman apply on the line of road. As to what would happen to make it apply, some unusual curve, you know, or maybe a swing of the engine that would be too great for it, and it would apply that way; it would put the brakes on immediately after the swing of the engine occurred. I don't know as I have had it happen over two or three times." (R. 49.)

He thought the engineer put on the brakes just as the right-hand switch was struck. He did not see him put them on, only heard the exhaust. He couldn't be certain whether the exhaust he heard was the engineer applying brakes or the Little Watchman applying them (R. 53, 54). *It is perfectly consistent with his testimony that the Little Watchman operated and applied the brakes when the switch threw*

the derailed front trucks violently out of line. If so, it certainly was operative.

Aside from the evidence of petitioner's witness, General Superintendent Madden, which we quoted on petition for certiorari, the only other testimony in the record regarding Wright's Little Watchman was that given by respondent's witness Goff. Goff was Master Mechanic of petitioner Southern Railway Company. But he was examined and vouched for by respondent as her witness. Respondent examined him on direct specifically about the construction, characteristics and functions of the Wright's Little Watchman. He was cross-examined by petitioner about the same subject-matter. Respondent was bound by both the direct and cross-examination of her witness on this subject-matter. We know of no justification for respondent's effort now (Brief, pp. 7, 8, 14) to repudiate his testimony given on cross-examination and to reject as conclusions favorable to his employer part of his evidence given on direct.

On direct examination Goff gave a detailed description of the locomotive involved in the accident, of the front truck and its wheels and safety chains, and of how the front truck would act when derailed (R. 74-78). He then testified as to Wright's Little Watchman.

His best recollection was that it had been in use five, six or seven years; he said that it was used on the majority of the engines of the Birmingham Division (R. 78). He described the mechanism, using drawings No. 8 (R. 117) and No. 9 (R. 118) to describe the mechanical details (R. 78-79). He testified the main body of the Watchman was fastened to the frame of the engine and was connected with the train air line; that if the trigger is moved up or down or in any other direction a certain distance, that opens the valve and permits the air from the train line to go into the atmosphere; that 100 pounds air pressure is carried in the train line, pumped up from the locomotive; drawing off air into the atmosphere reduces train line pressure and applies air brakes; eight or nine pounds drawn off by the engineer

makes a service application of brakes; more than twenty pounds drawn off makes an emergency application (R. 79).

Just as the engineer can make either a service or an emergency application of brakes, depending upon how much air he releases from the train line, so the witness testified that the Little Watchman would make either a service or an emergency application of brakes, depending upon the distance the actuating frame of the Watchman moves the trigger, *i. e.* depending upon the violence of the opening of the valve. If there is a slight or non-violent movement of the trigger and opening of the valve, only a service application of brakes results, but if there is a violent movement the trigger opens the valve enough to make it lock open, and an emergency application of brakes results (R. 80).

He testified that the setting or adjustment of the actuating frame (attached to the front truck) "is still in an experimental stage; we never have determined the exact distance for any of them. It depends on the curvature of the track; in other words, we have some conditions in the yard that are very much different from what they are on the main line, and we have to set them to suit the worst conditions we have, and it is in an experimental stage, that feature of it" (R. 80). In this connection he testified that sometimes a curve will set the Watchman and stop the train (R. 80, bottom). He said it would appear that it would have to work if the actuating frame came in contact with the trigger, and operate to set the brakes (R. 80-81).

He testified that the trip bracket (actuating frame) attached to the front truck and into the center of which the trigger of the Watchman projected, was an opening of approximately five inches vertically and eighteen inches from side to side; that the front truck would have to drop about 2-1/8 inches for the trip bracket to hit the trigger; that supposing the rail and tie plate is 5½ inches high and the trucks got off the track so as to mark the ties, the truck frame would have to fall from 3 to 4 inches (R. 81).

On the other hand he testified that 18 inches horizontal

opening of the trip bracket is allowed to take care of track curvature; that the lesser vertical opening of five inches is allowed "because if the truck drops, we want that to affect the trigger either way almost instantly if the truck gets off. The man that got it up intended to put it on there to stop the engine, instead of the brakes, in case of a derailment; in case the front truck got off" (R. 82).

When he got to the scene of the wreck the front truck and the trip bracket of the Watchman was all disconnected from the trigger and body of the Watchman (R. 82). Goff said that Stewart, Superintendent of Motive Power, had taken the Little Watchman off, for the purpose, he understood, of testing it, but that Goff did not test it (R. 82-83). He did not testify to any defective condition of any part of the Watchman.

He testified, "We don't know whether this watchman worked on this occasion or not. We don't know whether it stopped the train. We don't know whether it put the brake on; we couldn't tell about any indication that the brake had been put on" (R. 83-84).

On page 84 he testified that the frame might move the trigger just enough to apply brakes without locking the valve open, that it might be locked or it might not. "I couldn't answer how much it would have to move before it would lock it, because, as I said at the start, they are in an experimental stage and they vary."

On page 85 he again testified that the adjustment of the size of the trip bracket was still in the experimental stage and he illustrated this by showing that an adjustment which might work on one particular line of road would have to be entirely changed for another line of road.

Thus three times on direct examination respondent's witness Goff testified positively that the device is still in an experimental stage and he testified positively that its proper adjustment has not yet been determined. For her contention that the device was not experimental respondent relies entirely on the fact that the witness testified that this ex-

periment has been carried on for 5, 6 or 7 years and that a majority of the engines on this particular division of petitioner's railroad are equipped with the device which he declared to be experimental. Respondent's position is that such an experiment cannot be conducted for a period as long as seven years and as extensively as on a majority of the locomotives of a particular division of a railroad and still be experimental. Respondent seeks to repudiate as "conclusions favorable to his employer" the direct and positive testimony of respondent's own witness, who knew the facts, that the device is still in the experimental stage.

On cross-examination respondent's witness Goff testified that he was Master Mechanic of the Birmingham Division and that he had supervision of the rolling stock, locomotives, car and shop force and of the repair work on engines, cars, etc. (R. 85). He then testified:

> "This Wright's Little Watchman is just in an experimental stage. That experiment has been going on with engines on this division of the Southern Railway, within my knowledge, for five or six or seven years. As yet, it has never been demonstrated to be a perfect appliance in the operations; and its operation depends on the roadway conditions, the curvature of the track, the height of the track and everything of that kind; and you have to adjust the frame work and the trigger in such a way that it will not block the wheels of the train in the practical operation of the train; and to do that, you have to adjust it for the most extreme conditions that you have to meet in the operation of that engine; and I might say that we have had some delays to trains on account of this device setting; and that would then involve the necessity of increasing the size of the frame work; and also we have had some trip brackets, we have had some of the trip brackets to set at different heights on the same class engines; in other words, we couldn't make them exactly the same thing; we have set them the same thing and had them to set the brakes in emergency on the line of road. This trip bracket is the same thing we have been referring to here as the frame work of the part. It varies on different

class engines; I know of one particular instance that we set the bracket the same distance as another engine of the same class and it set the brakes in emergency on the line of road. We applied them ourselves; they have to be put on entirely. At times it wouldn't set using the same engine." (R. 86).

On re-direct examination by respondent this witness further testified (R. 86-87):

"We have not been using them on all the engines for five or six or seven years; we have been putting them on gradually. We have had some of them at least five or six or seven years. I don't know of a single passenger engine between here and Atlanta that hasn't got one of them; as I said in the beginning there, five or six or seven years; I meant we had been applying a number of them gradually, gradually increasing them. We quit for awhile, and then we started to putting them in again, and have been increasing since."

The only other testimony on the record regarding Wright's Little Watchman was that of petitioner's witness, General Superintendent Madden. He had had seven years active experience as locomotive engineer, two years experience as road foreman of engines having control over engineers and firemen. He then became trainmaster, serving in that capacity approximately twelve years. He served for ten years as division superintendent and thereafter as general superintendent (R. 93-94). As to Wright's Little Watchman, he testified (R. 96):

"On this engine, above referred to was an attachment known as Wright's Little Watchman, and is not a device required by the Interstate Commerce Commission. It does not come on new engines but is brought (bought) by the Southern Railway Company on the outside and applied by it. This device is not used generally by other railroads, and, so far as the undersigned is advised, is not used other than on Southern Railway Company's engines. The use of this device cannot possibly endanger the operation of the train. It is used in the hope that it may apply the brakes and

stop the train in event of derailment of front trucks. My experience with this device is that it sometime works and sometimes will not work, and that it cannot be relied upon with any degree of certainty."

The foregoing is all of the evidence on the record regarding Wright's Little Watchman. The testimony of respondent's witness Goff and of petitioner's witness Madden stands absolutely uncontradicted. We submit that this evidence regarding Wright's Little Watchman fully supports the following statement which we quote from our petition for certiorari (pp. 10-11):

"Petitioner insists that this testimony clearly shows: (a) That this device was not in general use; (b) that it is in an experimental stage; (c) that it is uncertain and cannot be relied upon to operate at all times and under all conditions when the front trucks of a locomotive are derailed; (d) that even in theory it would operate only if conditions developed which would bring the bracket in contact with the trigger; (e) that it was used merely in the hope that it might possibly operate if the front trucks became derailed; (f) that its use could not possibly cause 'unnecessary peril to life or limb' or in any way imperil the safety of the locomotive or train, but on the contrary might possibly add an element of safety not required by law and prevent injury to those on the train; (g) that the use of such a device on locomotives is not required under the rules and regulations promulgated by the Interstate Commerce Commission in accordance with the Boiler Inspection Act; and (h) that the use of this device shows an effort on the part of petitioner to go beyond the requirements of law in promoting the safety of its employees and those on its trains. Petitioner therefore insists that it cannot, under the controlling federal law, be penalized merely because on this particular occasion the device was not effective to provide the additional safety element beyond the requirements of law and to prevent the results of an accident otherwise caused.

"The inescapable fact is that if this same locomotive had never had the 'Little Watchman' applied to it, it would have complied with all requirements of federal

law, and under the same circumstances the same accident would have happened just as it actually did, without any liability on petitioner as for violation of the absolute duties imposed by the Boiler Inspection Act. With the device actually applied, but failing to operate to set brakes in the particular circumstances, the locomotive was identically as safe to operate and as free from 'peril to life or limb' as if the device had never been applied at all."

On the Foregoing Testimony Liability was Imposed on Petitioner as for Violation of an Absolute Duty Under the Boiler Inspection Act on the Mere Fact that the Little Watchman Failed to Stop the Train and Thus to Intervene to Prevent the Final Derailment and Death.

The charge of the trial court, considered in its entirety, is confused, inconsistent within itself, and so intermixes conflicting theories as to liability for negligence and as to liability for violation of charged absolute duty under the federal statute, that the jury could not be expected to have disassociated good parts of the charge from the bad. We of course do not assert that the entire charge was erroneous.

As we have heretofore pointed out, the allegations of respondent's petition regarding Wright's Little Watchman did not allege a violation of the Boiler Inspection Act, did not allege that the failure of that device to function to stop the train was a violation of the Boiler Inspection Act or of an absolute duty imposed by that Act. The allegation seems to have been a charge of common law negligence in failure to inspect the device and keep it in operating condition. The allegation was so stated to the jury by the trial court (R. 138-139, 141 middle).

Petitioner's answer to the allegations concerning Wright's Little Watchman, as heretofore shown, were a denial of failure to inspect and to keep in condition and amounted to an allegation of due care and a denial of com-

mon law negligence. They were so outlined to the jury by the trial court (R. 143).

The charge clearly divided the causes of action based upon alleged negligence from that submitted by the court under the Boiler Inspection Act. After charging the law of negligence, the trial judge (R. 145) took up as a distinct and separate subject the branch of the case dealing with asserted violation of the federal statute. This clear division of the two branches of the case is shown by the following paragraph of the charge (R. 145):

> "I will now charge you, gentlemen, upon the aspect of the plaintiff's case which deals with alleged negligence other than the charge of violation of what is known as the Safety Appliance Act and amendments thereto. I will later charge you separately as to the effect of any violation of the Safety Appliance Act. The law which is now being given to you is applicable to all the other charges of negligence contained in the two counts of the petition, except those relating to the Safety Appliance Act."

The court then proceeded to charge the jury under the negligence branch of the case as to assumption of risk, negligence and proximate cause (R. 145-147). The court then again outlined to the jury the allegations concerning Wright's Little Watchman (R. 147 bottom) and concluded (R. 148 top) as to these allegations:

> "The allegation is that this contrivance was not in working or functioning order at the time of the derailment, that the same failed to apply the brakes as was its design and purpose, and that had the 'Watchman' functioned, the train would have stopped long before striking the right hand switch."

Although, as we have pointed out, there was no allegation anywhere in respondent's petition of a violation either of the Safety Appliance Acts or of the Boiler Inspection Act, the only reference to a federal act in the pleading be-

ing to the Employers' Liability Act, the trial judge then quoted to the jury Section 2 of the Boiler Inspection Act (45 U. S. C. 23) and as to it said (R. 148 middle):

> "You are further instructed that the law to which the court has called your attention applies to the locomotive, its boiler, tender and all parts and appurtenances thereof, and the court charges the jury that a contrivance built on the engine and attached to certain apparatus connected to the engine, and which was so designed that under certain conditions the derailment of the front wheels would trip a valve and thereby apply the air on the brakes of the train, is a part and appurtenance of the engine or locomotive; provided, gentlemen, you find the following to be true:"

The proviso then stated by the court was that if the device was in an experimental stage, that if it was not perfected, that if it would work sometimes and at other times would not, that if it had not been in general use on this railroad or on other railroads for a sufficient length of time to be a fixed and permanent and reliable device for the purpose of which it was used, and if its limited and experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of the device, then "in that event the failure of this device to work or to perform its function would not be charged against the defendant *as negligence*, and the defendant would not be liable for a failure on the part of this device to operate properly." (R. 148-149; emphasis added.)

We submit that there was no evidence upon which the jury was justified in finding that this device was not experimental or that it was perfected, or that it always worked as intended if in proper condition, or that it had become a reliable device which could be depended upon. We submit that it was error for the court to authorize the jury to make such finding. In any event the proviso as stated by the court in its charge was limited to a proviso that if the de-

vice was experimental, etc., the failure of the device to work *would not be negligence.* After stating this proviso as a limitation on negligence liability the court then returned to the rule of the Boiler Inspection Act and charged that Act as imposing an absolute liability on petitioner without any limitation or condition. In this part of the charge, which the jury was bound to have considered as a charge separate and distinct from all theories of negligence, a portion of the charge specifically raised as erroneous in the specifications of error (Petition for Certiorari 20; R. 132, 3rd), the court turned from questions of negligence and charged the jury specifically:

> "If you find, gentlemen, that this device was used, as I say, so generally used for such length of time by the defendant that it became a part and appurtenance of the engine, and that the decedent was authorized to rely on it at this particular time by the conduct of the defendant in putting it on the engine and using it, under all the circumstances, then the following law would apply and this would be considered a part and appurtenance of the engine or locomotive at this particular time. I charge you that the duty put upon the defendant railway by the Act of Congress which the court has called your attention to, to keep the locomotive and all parts and appurtenances thereof in proper condition and safe to operate in the service to which the same are put, is an absolute duty on the railway. It is not subject to any limitation or condition, is positive and not dependent, and unqualified by any consideration whatever. Now, gentlemen, if the defendant at that particular time put this device there for the purpose for which it was intended, it was the duty of the railroad company at this time to see that it was in proper working order, whether it was in an experimental stage or not." (R. 149-150).

Thus, after making the question of whether the device was experimental or not a proviso bearing upon the applicability of the law of negligence, when the judge charged specifically under the Boiler Inspection Act he charged an

absolute and unconditional duty, unqualified by any consideration whatever, and charged that that duty existed whether the device was experimental or not. Aside from all else, this was clear error.

The court of appeals clearly held that the Boiler Inspection Act applied, although that court confused the Boiler Inspection Act both with the Safety Appliance Acts and with the Federal Employers' Liability Act. After quoting the gist of Section 2 (45 U. S. C. 23) of the Boiler Inspection Act, and confusing that as an amendment of the Federal Employers' Liability Act rather than as an amendment of the Safety Appliance Acts, although referring to the Liability Act of April 22, 1908, as being the Safety Appliance Act, the appellate court held (R. 159):

> "This law imposes on carriers in interstate commerce the absolute duty to keep their locomotives and all the parts and appurtenances thereof free from defects and safe to operate. It is not a question of negligence, but the railway company is bound to see that all parts and appurtenances are in a safe and proper condition."

And again (R. 160) the appellate court specifically held:

> "5. A safety device constructed and designed for the purpose of automatically applying the airbrakes whenever the front trucks of a locomotive engine leave the rails from any cause, called a 'watchman,' which is attached to the front trucks under the boiler of the engine, some 35 or 40 feet in front of the cab where the engineer sits, and which will, if in proper working condition, when the trucks leave the rails and drop down as much as two and one half inches, trip a trigger, which opens a valve and puts the airbrakes on, and will stop the train within 200 yards; and which in this case had been attached to the locomotive for from five to seven years, and with which all of defendant's locomotives on this division are equipped, is properly a part and appurtenance of the locomotive, within the purview of the Federal safety-appliance laws, requiring a locomo-

tive engine of an interstate railway company and all parts and appurtenances of such locomotive to be in proper condition to operate safely, and that they be kept in that condition, although the appliance is not one that is required by such Federal laws to be attached to the locomotives of interstate railway companies."

And again (R. 161) the appellate court said:

"This is so even though the Federal safety-appliance act and the rules and regulations of the interstate-commerce commission relative to interstate carriers do not specifically designate this particular contrivance as a safety device which must be placed upon the locomotives of interstate carriers, because when the defendant placed such device upon its locomotives it became a 'part and appurtenance' thereof within the purview of the Federal statutes relative to safe appliances of interstate carriers. The fact that the little 'watchman' was not a device in general use by other railway companies, and was not a standard safety appliance, would not prevent it from becoming a part and appurtenance of the locomotive of the defendant. If a part and appurtenance thereof, then, under the safety-appliance laws, it must be at all times kept in proper working condition, and if, as a result of the failure of such appliance to be in proper condition and to work on this particular occasion, the decedent, an engineer of the defendant railway, met his death, the railway company would be liable. It was an absolute duty on the part of the railway company to see that its locomotive, boiler, tender and 'all' parts and appurtenances thereof were in proper condition and were kept in proper condition."

Thus, entirely aside from all questions of negligence in failure to inspect and maintain, the courts below, applying the Boiler Inspection Act, held that that Act imposed an absolute and unqualified duty upon petitioner to see to it that this device would work as it was designed and hoped that it should work in spite of the experimental nature of the device, and in spite of the fact that it is not a device re-

quired either by the Safety Appliance Acts or by the Boiler Inspection Act or by any of the orders and rules of the Interstate Commerce Commission promulgated under authority of the Boiler Inspection Act, and although the rules for inspection issued by the Commission under that authority do not provide for its inspection and testing, and liability was imposed upon petitioner, as for a violation of this absolute and unqualified duty, upon evidence which merely tended to show that the device did not on this occasion function to stop the train after the initial derailment caused by the mischievous act of the child in placing the rock on the track and did not thereafter intervene to interrupt the chain of causation and to prevent the final derailment and save the life of the engineer.

There was no charge by the trial court and no holding by the appellate court that there could be a violation of the Boiler Inspection Act only if the failure of the Little Watchman to function created a condition causing "unnecessary peril to life or limb" within the very language of the Act itself. No question of unnecessary peril to life or limb was submitted to the jury. It was authorized to find that a failure of the device to function so as to stop the train after the initial derailment was a violation of petitioner's absolute duty under the Boiler Inspection Act. This amounted to authorizing the jury to find that a failure of the device to function so as to raise the safety standard of the particular locomotive above that required by the Act was a violation of an absolute duty imposed by that Act.

ARGUMENT.

I.

ONLY THE QUESTION AS TO THE APPLICABILITY OF THE ABSOLUTE RULE OF THE BOILER INSPECTION ACT TO THIS NON-REQUIRED DEVICE IS RAISED.

As was said on petition for certiorari (p. 11), the indisputable fact is that if this same locomotive had never had "Wright's Little Watchman" applied to it, it would have complied with all requirements of federal law, and yet under the same circumstances the same accident would have happened just as it actually did, and there could have been no suggestion that there was any violation by petitioner either of the Boiler Inspection Act or of any provision of the Safety Appliance Acts and no *absolute liability* under any of those Acts could have been imposed on petitioner.

It is further undisputed on the record that, as testified by General Superintendent Madden (R. 96), "The use of this device cannot possibly endanger the operation of the train." It necessarily results that the locomotive with the device installed, even if not operative, was exactly as safe as the locomotive would have been without the device and could not possibly have entailed any greater peril to life or limb.

The function of the device was not to prevent a derailment. It was only designed to operate after a derailment had occurred. It was installed in the hope that after the occurrence of a derailment, otherwise caused, it might operate to limit or reduce the seriousness of the damage resulting therefrom. It could not possibly contribute positively to a derailment or to any result thereof or to any other danger. If it should operate, it could only have effect by becoming an intervening cause, intervening to interrupt the chain of causation flowing from the *causa causans* of the derailment. Its role in this case was purely negative.

It merely failed to intervene to interrupt the natural sequence of result flowing from the act of the outsider in putting the rock on the track.

The narrow but important question presented is whether its failure to assume an active role, to operate to apply brakes and stop the train after the derailment caused by the rock, constituted a violation of *an absolute duty*, asserted to have been imposed upon petitioner by the Boiler Inspection Act, to see to it that the device should so operate in any event, making petitioner absolutely liable as insurer for the failure of the device so to operate for whatever reason.

If that is the law, then, even though the use of this device by petitioner, in the laudable effort to achieve if possible a higher standard of safety than that required by federal law, may have saved hundreds of lives during the five to seven years during which petitioner has been experimenting with the device, it would seem to be necessary for petitioner for its self protection to remove the Little Watchman from all its locomotives and thus to *lower* their standard of safety to that required by the Boiler Inspection Act. At that lower standard of safety petitioner would be free from liability as for violation of absolute duty.

If the law is as respondent asserts, it necessarily follows, and respondent is forced to argue on brief, that the Boiler Inspection Act does not set up one uniform and universal rule or standard of safety applicable to all carriers, but sets up two rules or standards: a minimum rule, applicable to those carriers which content themselves with complying with the rules established by the Interstate Commerce Commission; and a maximum rule, applicable to those carriers which make efforts to achieve a higher standard than that required by the law.

Such a concept of a minimum and a maximum standard is difficult to grasp. The maximum standard would have no upward limit save the inventive genius of man. As genius

and invention raise an individual safety standard to greater and greater possible heights, this shifting and fugitive *maximum* rule of the law would pursue it, fix it at the highest point of possible attainment and at that point would make it *absolute*. Such a concept is hardly possible philosophically. It certainly is wholly unreasonable legally.

We reiterate what was said on brief in support of petition for certiorari (p. 21)—we do not contend that where a railroad voluntarily installs on a locomotive a device not required by the Commission's rules it would not be liable *under the negligence rule of the Employers' Liability Act* if negligent installation or negligent failure to maintain should proximately cause injury.

The question is whether the absolute rule of the Boiler Inspection Act pursues such voluntary effort to achieve a higher than the legal standard and transmutes the effort into an absolute and mandatory rule of conduct, the failure to attain which imposes liability at all events.

II.

ANALYSIS OF THE BOILER INSPECTION ACT AND CONSIDERATION OF THE COMMISSION'S RULES THEREUNDER.

The pertinent section of the Boiler Inspection Act, which sets up whatever legal standard of safety is set up by the Act is Section 2 (45 U. S. C. 23). It is one sentence, which we have always understood to be made up of three interrelated and mutually modifying clauses:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the pro-

visions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

After providing for appointment of mechanical experts, a chief inspector, and assistant chief inspectors, and for their offices in Section 3 (45 U. S. C. 24-25), for inspection districts and district and additional inspectors in Section 4 (45 U. S. C. 26-27), the Act then in Section 5 (45 U. S. C. 28), as construed by this Court in the recent power reverse gear case, *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, confers upon the Commission plenary legislative power, not merely to approve rules for inspection initiated by carriers or by the Chief Inspector, but itself to establish by direct proceeding not only rules for inspection but also rules requiring the equipment of locomotives with such safety devices as the Commission shall find are necessary to make them achieve the safety standard imposed by the Act; that is to render them "in proper condition and safe to operate" in the sense that "the same may be employed in the active service of such carrier without unnecessary peril to life or limb."

The responsibility for rules adequate to attain that standard was imposed by Congress on the Commission. The Commission sets the standard of safety under the Act. It imposes the mechanical requirements compliance with which constitutes compliance with the Act. *United States* v. *Baltimore & Ohio R. Co., supra; Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611; *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521.

The Act became law February 17, 1911. On June 2, 1911, the Commission entered its first order in pursuance of that statute. (See official pamphlet of Laws, Rules, and Instructions, pp. 15-17). In that order it was recited that certain carriers had filed their rules and instructions for inspection within three months after enactment, as required by Section 5 of the Act; that other carriers had filed no rules; that the Chief Inspector had thereupon pre-

pared rules for the carriers which had not filed; that the whole matter came on for hearing and establishment of rules and instructions; that the carriers which had filed rules asked "that such of said rules and instructions which did not fulfill the requirements of the proposed rules and instructions prepared by the chief inspector be modified to the extent necessary to conform thereto, and that such of said rules and instructions as prescribed *a higher standard* than that required by the rules and instructions prepared by the chief inspector be regarded as withdrawn from consideration, and joined in a request that such rules and regulations as had been prepared by the chief inspector and approved by the Interstate Commerce Commission *be established with uniformity for them and all other carriers subject to the act.*" (Italics ours.)

Evidently considering that that suggestion was in accordance with the legislative purpose to establish one uniform mechanical standard for compliance with the safety standard imposed in general terms by the Act, the Commission adopted that course, approved the Chief Inspector's rules and ordered (p. 17, official pamphlet):

> "*It is ordered,* That said rules and instructions for the inspection and testing of locomotive boilers and their appurtenances, as follows, be, and the same are hereby, approved, and from and after the 1st day of July, 1911, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: *Provided,* That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents."

Thus the Commission itself, in its original order, fixed the minimum mechanical requirements, compliance with which would constitute compliance with the safety mandate of the law, but also recognized that carriers might do just what petitioner in this case has done, i. e., undertake

voluntarily to go beyond the legal requirement and adopt measures "tending to a greater degree of precaution against accidents" than the law required.

The Commission was manifestly fearful that the establishment of minimum requirements under the law might deter railroads from experimentation and initiative in attempts to adopt measures "tending" to achieve higher than the legal standards and wisely negatived any intention to interfere with such attempts.

It is quite evident that the Commission did not think that when such an attempt was made an absolute rule of the statute pursued the attempt and impinged upon it at the highest point of possibility it might attain, fixing it at that point as an absolute legal standard which must be attained. It is quite evident that the Commission considered such attempts as above or beyond the law, not within its absolute rule, else the Commission would certainly have gone further and adopted, as part of the legal standard, such additional voluntary rules as might be adopted by any carriers "tending to a greater degree of precaution against accidents."

Following that original order, as the Act has been broadened by subsequent amendments so as to cover not only the boiler but the entire locomotive and tender, the Commission has correspondingly broadened its rules and instructions, has added new elements to the mechanical legal standard of safety.

It has been by amendments to these rules and instructions that the Commission has required installation, maintenance and inspection of additional safety appliances found by it to be necessary to prevent "unnecessary peril to life or limb," cab curtains, 142 I. C. C. 199, 201, and automatic fire doors, 151 I. C. C. 448, 450. It was by amendment to these rules that the Commission undertook to require installation of power reverse gears. See *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 456.

If the Commission, upon proper hearing, sufficient evi-

dence, and competent finding that the use of such device and the keeping it in operating condition is necessary to prevent "unnecessary peril to life or limb," should decide to enter such an order, it undoubtedly has the power under the Act to require the installation, maintenance and inspection of Wright's Little Watchman or if some other device intended to apply brakes mechanically in case of a front truck derailment, provided it can find any such device so perfected and reliable that its requirement is consistent with making it a part of the absolute standard established under the Act.

The Commission has not found such a device or at least has not made it a part of the legal standard. It must know of Wright's Little Watchman. Its inspectors have been inspecting petitioner's locomotives throughout the seven or so years of petitioner's experimentation with the device. They do not inspect the device itself because it is not covered by the Commission's rules for inspection, but they must know of the existence of the device and of its use by the petitioner. The Commission's inspectors investigated this very accident and inspected the locomotive after the derailment, in company with officials of petitioner (R. 95-96). Of course no use could be made in the case of their report or of the Commission's report of the accident, since the Act in Section 8 (45 U. S. C. 33) expressly provides:

> "Neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation."

If the Commission should require the device, by amendment of its rules, then the device would come under the absolute duty imposed by the Act. But we think that until it is so required it does not come within the absolute

duty imposed by the Act. Its use is within the express permission to carriers to adopt additional means and methods "tending to a greater degree of precaution against accidents" than that required under the Act. Its use is in no wise inconsistent with the Commission's rules. *It cannot endanger the operation. It cannot make the locomotive less safe than it would be without it.*

If the locomotive without the device complies with the legal standard—and this one would have so complied—then the use of the device, even if it be inoperative because not perfected, because adjusted to maximum rather than minimum curvatures and track conditions, or for any other reason, cannot possibly make the locomotive less safe to operate without unnecessary peril to life or limb, cannot reduce the safety standard of the locomotive below what it would be without it, viz. a standard in compliance with the law.

If it operates as hoped, and stops a train after a front truck derailment, then its operation accomplishes the achievement of a "higher degree of precaution against accidents" than that required by the law. How then could its failure to achieve that higher standard constitute a violation of an absolute duty under the Act?

III.

THE BOILER INSPECTION ACT SETS ONE UNIFORM MINIMUM STANDARD OF SAFETY, NOT TWO, A MINIMUM AND A MAXIMUM.

Respondent's argument treats the first modifying clause of Section 2 of the Act, "unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put," as being entirely distinct and disconnected from all that follows in the sentence. That modifying clause is said to establish an absolute maximum rule of safety which applies to any device which a carrier may

place on its locomotives, even though not required by the Commission's rules.

Respondent's argument will not even admit of reading the next clause following the comma, "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," as a limitation on or modification of the first modifying clause. There could be no contention on the evidence in this case that the presence of an inoperative Little Watchman on this locomotive caused any unnecessary peril to life or limb, any more than if the locomotive be operated without the device affixed to it, which the law allows.

Respondent's argument evidently considers the second, or "unnecessary peril to life or limb" clause, and the third clause as to inspection and meeting the tests of the Commission's rules, together as establishing the second or *minimum* rule or standard set by the statute, and considers that the first modifying clause standing alone sets up the so-called first or maximum rule or standard.

We can only read the one sentence of Section 2 as one sentence. It seems to be tolerably plain and understandable English. It seems to set up one statutory rule or standard of safety for locomotives and tenders.

As we read it it means that it is unlawful to operate a locomotive unless the locomotive, its boiler, tender and all parts and appurtenances thereof are in such condition and so safe to operate as not unnecessarily to imperil life or limb, and that the mechanical test as to whether they are in that condition is the yardstick applied by the Commission's rules for inspection and testing.

In the power reverse gear case, *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 462, this Court held that even the Commission's rule-making power is limited by the clause as to unnecessary peril to life or limb; that it could not require power reverse gears except upon a competent finding that use of a locomotive "equipped with hand reversing gear as compared with power reverse gears causes unnecessary peril to life or limb."

In that case the Court recognized not only that the Act does not, in its general language, impose a statutory rule of absolute safety but also that it does not authorize the Commission to undertake to impose any quasi-legislative rule of absolute safety and that such a rule would be impossible. "The operation of an engine, however equipped, inolves 'danger to life or limb'." it was there said (p. 462). And it was held that "The Act does not confer upon the Commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem desirable."

We submit that where the Commission has not required such a device as the Little Watchman, has established no rules for its inspection and testing, where the device cannot possibly endanger the train, the Act has not given juries throughout the land such discretionary commissions to find that a failure of the device to function so as to create a higher standard of safety than that established by the Commission under the law is a violation of an absolute duty imposed by the Act.

If we read correctly the fusible plug case, *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, it held that it was not to be left to the "varying and uncertain opinions and verdicts of juries" whether the absence of a certain device not required by the Commission's rules was a violation of the standard of duty imposed by the law and imposed upon a railroad an absolute liability.

The absence of a non-required device is just as complete a failure as the presence of a non-required device which fails to function in a way to achieve a higher standard of precaution than the Commission under the Act has required. The failure of such a device to function or to operate successfully might result from negligence. If under ordinary rules of negligence a proximate causal relation between such negligence and an injury can be established, that is one thing. It is a very different thing to authorize a jury to impose liability as for violation of an absolute,

unqualified duty under the Boiler Inspection Act, by reason of the failure of such a device to achieve a "higher degree of precaution against accidents" than has been authoritatively fixed under the Act.

If we read *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605, correctly the Act puts it exclusively within the jurisdiction of the Commission "to prescribe the rules and regulations by which fitness for service shall be determined." It is the Commission which sets the standard by which conformity with the general mandate of operating safety of the statute is to be measured. For this reason the Court held that State Commissions were without power to require cab curtains and automatic fire doors.

The question here presented may well be tested by supposing a case arising after this Court's decision in the *Napier Case* and before the Interstate Commerce Commission amended its rules so as to require cab curtains and automatic fire doors. Some railroads had in that period voluntarily installed cab curtains and fire doors in an effort to raise their particular locomotives to a higher standard of safety than then required under the Act. If that were not so the Commission could not have made use of the experience of railroads with cab curtains and fire doors in its orders in 142 I. C. C. 199 and 151 I. C. C. 448. Suppose in that period a railroad had a locomotive on which cab curtains had been voluntarily installed and the curtain was torn or fell off and a fireman was exposed to drafts as a result and contracted pneumonia; or suppose a locomotive on which an automatic fire door had been voluntarily installed and by reason of its failure to operate a fireman was exposed to glare and heat and injured. Could a jury have been instructed to find that a failure of the cab curtain to protect the fireman from drafts or a failure of the fire door to operate was a violation of an absolute duty under the Boiler Inspection Act? We think not. After the Commission required cab curtains and fire doors

a different question would be presented, but before that requirement there could have been no absolute duty under the Act. There might have been liability for negligence, but that, again, is a different question.

The postulated cases are identical with ours.

Respondent argues that while this Court did hold in the fusible plug case, *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521, that a jury was not authorized to find that a fusible plug in the boiler was necessary to meet the standard of safety of the Act, yet if the carrier had voluntarily used a fusible plug and it was defective and an explosion resulted the railroad would have been guilty of a violation of the Act. Respondent assimilates that to our case, but we think it quite different.

In the case assumed by respondent the Act would have been violated because a defective condition in the boiler (a defective plug, regardless of whether fusible or non-fusible) created a condition of unnecessary peril to life or limb. Liability would have been imposed not because a *fusible plug* was used, but because a *defective plug* was used. Plugs are necessary parts of boilers. The rules of the Commission (Rules 1 to 55) cover in the greatest detail the inspection of both exterior and interior of boilers and of all parts thereof a defective condition in which might make a boiler unsafe. While the use of fusible plugs, instead of non-fusible, is left discretionary with the carrier, if they are used Rule 14 expressly covers their inspection (Pamphlet, p. 49) as follows:

> "14. Fusible plugs—If boilers are equipped with fusible plugs they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection."

So in respondent's assumed case the fusible plug would have been expressly covered by rule.

In our case there is not only no requirement that a Little

Watchman be used but there is no rule by which the Commission has recognized that device or provided for its inspection and testing to determine whether its condition is such as to violate the statutory rule.

We cited other cases on our brief in support of petition for certiorari which in our opinion support the view of the law which we take. We do not elaborate those cases again here.

We do, however, suggest to the Court that the courts below confused the Boiler Inspection Act with the Safety Appliance Act. The absolute duty imposed by the Safety Appliance Act is distinctly different from the rule imposed by the Boiler Inspection Act. In the Safety Appliance Act Congress did not in general terms lay down a rule of safety and authorize the Commission to set the mechanical standard by which such rule was to be admeasured. In that Act Congress made its own mandatory requirement as to installing particular devices and as to how they should function and the condition in which they must be kept.

It required a power driving-wheel brake (45 U. S. C. 1) and that duty is absolute and failure to comply results in absolute liability.[1]

It required "couplers coupling automatically by impact, and which can be uncoupled without necessity of men going between the ends of the cars." (45 U. S. C. 2). That imposes an absolute duty and if the couplers cannot be uncoupled without necessity of men going between cars and an injury results absolute liability follows.[2] It required "secure grab irons or handholds" (45 U. S. C. 4) and a failure to comply with that requirement imposes absolute liability.[3] It required drawbars of standard height (45 U. S. C. 5) and a failure to have them of that height

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[1] *Texas & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33.

[2] *Pennsylvania Co.* v. *United States*, 241 Fed. 824; *Norfolk, etc., R. Co.* v. *United States*, 191 Fed. 302; and many other cases.

[3] *St. Joseph & G. I. Ry. Co.* v. *Moore*, 243 U. S. 311.

violates an absolute duty.[1] It required "secure sill steps and efficient hand brakes" and "secure ladders and secure running boards" (45 U. S. C. 11) and a failure to have them so is a violation of an absolute duty and results in absolute liability.[2]

Similarly in the later Ash Pan Act of May 30, 1908, (45 U. S. C. 17) Congress mandatorily required "an ash pan, which can be dumped or emptied and cleaned without the necessity of any employees going under such locomotive." If an ash pan cannot be dumped without the necessity of an employee going under the engine absolute liability would undoubtedly result.

It was perfectly possible and practical for Congress to lay down in the Safety Appliance Acts these mandatory requirements as to essential and comparatively simple safety appliances such as power brakes, automatic couplers, grab irons, handholds, running boards, ladders, sill steps, and ash pans. It is perfectly possible and practical for juries to determine when these requirements have been complied with.

But when Congress came to deal with safety of locomotives and boilers the infinite complexity of steam locomotives presented engineering and mechanical problems of the greatest delicacy, which Congress could not undertake to regulate by detailed legislative prescription as to design, functioning, testing, condition, etc., of particular parts and appliances. As was said in the *Groeger Case* (266 U. S. 521, 530), that Act "required a condition which would permit use of the locomotive without unnecessary danger." But as held in the *Napier Case* and in the *Power Reverse Gear Case*, it lodged final authority in the Commission to make the rules and regulations under which the fitness for service, enjoined in only the general terms of the statute, is to be measured. If the locomotive meets the test of the Commission's rules it complies with the mandate of the statute. If it fails to meet that test it violates the statute.

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1 *St. Louis, etc., R. Co.* v. *Taylor*, 210 U. S. 281.

2 *Chicago, etc., R. Co.* v. *United States*, 220 U. S. 559.

While the duty is absolute, as held in the *Groeger Case*, it is not a duty to achieve *absolute* safety, it is not a duty to achieve such safety as a jury may think the carrier should attain, it is an absolute duty to meet the reasonable test or measure of safety established by the Commission under authority of the Act. Here Congress could not set up the exact mechanical measure of the statutory rule of safety, but it authorized the Commission to set it up, wisely providing for expert assistance from the carriers and from expert federal inspectors.

The cases relied on by respondent practically without exception deal with safety devices specifically required by the Safety Appliance Act. We submit they are not in point here.

We think this necessary distinction was caught and well expressed by the Supreme Court of Wyoming in *Chicago, B. & Q. R. Co.* v. *Murray*, 40 Wyo. 324, 277 Pac. 703, 706, where it was said:

> "There can be no doubt that the Boiler Inspection Act was 'enacted for the safety of employees' within the meaning of sections 3 and 4 of the Employers' Liability Act (citing cases). It differs, however, from the Safety Appliance Acts (citing them), in that the latter require certain named appliances to be installed and maintained, while the Boiler Inspection Act requires in general terms that the locomotive and all parts and appurtenances thereof shall be kept in proper condition and safe to operate in the service to which the same are put. Further, the Boiler Inspection Act, as construed by the courts, confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives, and to prescribe rules and regulations by which fitness for service shall be determined. Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 612.
>
> "When a carrier fails to install and maintain a safety appliance required by a specific rule promulgated by the Interstate Commerce Commission under authority of the Boiler Inspection Act, we may assume that the consequences would be the same as though

there had been a violation of some provision of the Safety Appliance Acts. We doubt whether it can be said that the defendant in the case at bar had violated any rule of the Commission. The only rule that is called to our attention is rule 120, above, requiring that locomotives be equipped with proper sanding apparatus which shall be maintained in a safe and suitable condition for service. But the hand sander was only a secondary sanding apparatus, and there was no evidence that the air sander was not in safe and suitable condition and a sufficient compliance with the rule."

Thus in *Lancaster & Wight* v. *Allen*, 110 Tex. 213, 217 S. W. 1032, the Supreme Court of Texas reversed a recovery against railroad receivers predicated on a finding that injury was caused by a negligent condition of a wheel flange, because the trial court refused a requested charge that if the flange was in accordance with the rules enacted by the Commission, in regard to wheel flanges, under the Boiler Inspection Act, the jury would not be warranted in finding negligence. The Court said:

"It is true that, in the absence of a violation of some other statute, the common carrier's liability under the federal Employers' Liability Act, for injury or death, by reason of defect in equipment, does depend on whether the defect was due to the carrier's negligence. The finding of negligence on the part of the common carrier in such cases is indispensable to liability. But where a statute requires the common carrier to furnish certain equipment, or to furnish equipment in a certain condition, and the carrier violates the statute, and thereby causes death or injury to an employee, and the violation of the statute fixes liability for the consequent damages. Hence, with respect to the flange of the wheel in this case, the sole question was as to whether it was in a condition prohibited by the rules of the Interstate Commerce Commission, and therefore by the act of Congress; and inquiry was utterly futile as to whether the receivers had exercised or had failed to exercise, any degree of care to render the flange safe."

Conversely, we submit that where neither the statute nor the Commission's rules required the Little Watchman in our case, where it could not possibly endanger the train or the safety of employees or others, where there is no showing that the locomotive violated any of the Commission's rules, and where the locomotive would have fully complied with the Boiler Inspection Act if the Watchman had never been installed and was exactly as safe with the device installed and non-operative, it cannot be said that a failure of the device to function so as to attain a higher standard than that required by the law was a violation of an absolute duty under the law.

Unless we are correct in our thought that the Act imposes one uniform standard, that of complying with the Commission's rules, rather than two standards, a minimum standard of compliance with those rules where devices are required by them and a maximum rule imposing an absolute duty as to all devices voluntarily applied by carriers but not required, then the asserted *maximum* requirement is an absolute statutory duty to comply with a standard of safety not defined in the statute or elsewhere with sufficient precision to enable carriers to know when they are complying. Such standard is wide open for juries to impose whatever measurement they may see fit by their "varying opinions and verdicts."

That would amount to a statutory attempt to impose an absolute rule requiring absolute safety, or safety without definition, and the gravest doubts would arise as to the constitutionality of such an attempt under the Fifth Amendment.

IV.

IF THE ACT DOES IMPOSE TWO RULES INSTEAD OF ONE, THE SUPPOSED MAXIMUM RULE IS CERTAINLY LIMITED BY THE WORDS "WITHOUT UNNECESSARY PERIL TO LIFE OR LIMB."

If, however, there are two rules or standards of safety set up by the Act, one a general rule of safety to apply to

devices not required by the Act or by the Commission's rules, the other a minimum rule to apply to all devices covered by the Commission's rules, then it is so plain as to be hardly debatable that the general rule of the statute, applicable to non-required devices, is not a rule of absolute safety, and is not a rule requiring operation of such a device in any event, but is a rule limited by the words "without unnecessary peril to life or limb."

Necessarily, from the language of the Act and from the decisions of this Court, if two rules are set up, both the maximum or general rule of safety to operate and the provision empowering the Commission to establish minimum rules as to required equipment, are modified by those words "without unnecessary peril to life or limb."

The maximum standard, if there be two, is clearly that the locomotive, its boiler, tender, and all parts and appurtenances thereof not required by the Commission's rules shall be "in proper condition and safe to operate in the service to which the same are put" in the sense "that the same may be employed in the active service of such carrier without unnecessary peril to life or limb."

This case was not put to the jury below or affirmed by the Appellate Court of Georgia, however, upon any such concept of the law. The trial court did not authorize the jury to find the Act violated if the failure of Wright's Little Watchman to function to stop the train created a condition of unnecessary peril to life or limb. He authorized them to find the failure of the device to function was a violation of an absolute duty to have the engine safe to operate.

The locomotive, which would have fully complied with the Act if the device had never been installed, which in that state as matter of law would have involved no unnecessary peril to life or limb, manifestly involved no such peril with the device installed and failing to operate, because it was exactly as safe in the one state as in the other.

It would be a wholly different case if a carrier had voluntarily installed a non-required safety device, a defective condition in which might create a peril which would not have existed without it and thus make the locomotive less safe than if the device had not been installed.

V.

REPLY TO RESPONDENT'S ARGUMENT THAT THE LITTLE WATCHMAN IS COVERED BY COMMISSION RULE 106.

Respondent argues (Main Brief 23) that Rule 106 (Pamphlet, p. 61) covers the valve of the Little Watchman and requires its inspection and that therefore there was a violation of an express rule. The rule deals with the air brake system. It does require inspection to ascertain "that the brake valves work properly in all positions."

If it be assumed that the valve, which is only one element of the Little Watchman, is within that rule, the fault of the argument is that no such question was submitted to the jury below and no such theory was dealt with by the courts below. There was no charge in pleading of a violation of that rule. No question of a violation of that rule was submitted to the jury and the record does not disclose that respondent advanced the theory of a violation of that rule at any stage of the case below.

To meet a cause of action on that theory is a very different thing from meeting a case asserting that a failure of the Little Watchman as an entire device to stop the train was a violation of an absolute duty under the Act to have it in such condition that it would be effective to stop the train.

CONCLUSION.

For the reasons assigned in the petition for certiorari and supporting brief and in this brief, we respectfully submit that the judgment and decision of Court of Appeals of Georgia herein should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, Deceased, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI

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The defendant never pretended to explain why this watchman did not function. The inference was overwhelming that the watchman was out of condition and defendant made no explanation of its condition.. 8-9

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(3) The locomotive is considered by this locomotive appliance statute as just as safe as all the parts and appurtenances on it make it when they function properly, and that degree of safety is imperiled when they fail to function. In the general sense of this statute, the engine must be safe to operate in the service to which it is put. In other words, with the appurtenances placed by the carrier on the engine, the degree of safety which would result if those appliances functioned properly must be maintained 24-25

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PETITIONER'S STATEMENT OF THE FACTS DOES NOT GIVE THE COURT A CORRECT VIEW OF THIS CASE, AND AT SOME PAINS WE WISH TO PRESENT THE FACTS, AS WE VIEW THEM, BEFORE THE COURT.

The case was brought upon two theories, — first, negligence in reference to the condition of the track, road-bed and right-of-way caused the initial derailment and not the small rock placed thereon by the negro child; second, defendant had equipped its engines with an appliance known as a watchman, which applied the air brake whenever the front trucks left the track and dropped down as far as 2½ inches, and which should have stopped the train before the final derailment and wreck.

There was abundant evidence that the track was out of condition, that the ties were rotten, that they were insufficiently spiked at both the place where the original derailment occurred and where the second derailment occurred. We refer the court to the photographs on pages 103, 107, 108 and to the testimony of Lunsford on pages 56, 57 and 58 of the record.

That the evidence supported the theory that the watchman should have applied the air, and did not apply it, and that had it functioned the train would have stopped in two hundred yards after the initial derailment (whereas the train ran seven-tenths of a mile) is shown by the testimony of Goree, who testified on page 48 that if the air had been applied at the initial derailment the train would have stopped in fifteen car lengths of forty feet to the car, which would make six hundred feet or two hundred yards; by the testimony of Lunsford that beginning with the initial point of derailment throughout the entire seven-tenths of a mile, the wheels of the front trucks dropped down from the top of the rail to the cross-ties where marks were made by both of the wheels on the ties (Lunsford, pages 55, 56 and 57); by the testimony of Holcombe to the effect that the rail was 6¾ inches high (record page 63) that the mark of the flanges of the front wheels began at the point of derailment opposite the negro church (record page 62) and that the mark of the front wheels on both sides was on the cross-ties from the point of initial derailment to the final turnover (showing as a physical fact that the trucks had dropped 6¾ inches and allowing one inch for the flange had dropped a net distance of 5¾ inches).

It was shown by the fireman Goree and by all the train crew, Davis and Dowdle, that no brake was put on at the initial derailment or during the seven-tenths of a mile when the engine was running on the track with the front wheels off (see Davis, conductor, page 87, and Dowdle, baggage man, page 89 of the record). Goree, the fireman, said at the final turnover, after the engine had run with the trucks off for seven-

tenths of a mile, the engineer, when the entire engine got off the rails and headed in on the sidetrack, which was the time of the final turnover, put on his air brakes (record page 47). Neither the engineer nor fireman had discovered, or could discover, the first derailment of the trucks, as the engine was running apparently normally.

There was evidence that the rock or sandstone put on the track by the little negro boy did not derail the engine. The witness Holcombe, on page 62, who got to the scene right after the wreck, testified that there was just a little pile of sand rock crushed on the rail, "no great sight, a small amount, I think there wasn't much more than two handfuls, I don't think there was."

The witness Goree, who was the fireman, testified on page 49:

> "I have run over one as big as a hen's egg when we were working local. The engine crushes the rock. I don't think I have ever known of a rock throwing the engine off before in my experience. I couldn't estimate how many times I have ever run over stones or rocks or sandstone; I guess hundreds of times, because I have been here twenty-six years. When we want to stop an engine, we have a sand box on our engine. You apply sand if you want to; it isn't essential, but you can do it. That does not make the engine run off the track; it tends to stop it because of the friction."

Further on at the bottom of page 49, this witness testified:

> "If I were running an engine along, and saw a small rock on the track, I would not stop for it. The engine usually crushes it, or just brushes it off, and sometimes you don't ever know it. If a rock was a foot high the pilot would knock it off."

The witness H. A. Cox testified (see record page 70) to the effect that he had picked a sand rock up near the place

of this wreck; that Holcombe, the deputy sheriff, was along when he found the rock; that he had been a fireman for years; that he never had anything like that to derail trains; that he had run over rocks many times with trains; that when a rock is struck by an engine weighing 140 or 160 tons it would knock it off but if it hit it it would crush it, "That rock crushed up is almost the same as common sand. You sand the track to keep the engine from slipping when starting the train." (Record page 71.)

The Court of Appeals of Georgia in its opinion held that there was evidence to support the verdict on both counts of the petition, that is, on the defective track and road-bed and on the failure of the little watchman to function, the language of the Court of Appeals on page 163 being as follows:

> "There were two theories in the case, one of negligence and the other based on the safety-appliance laws, and the judge properly separated these theories and instructed the jury as to the same. None of the special assignments of error show any error as against the defendant. There was evidence tending to substantiate the plaintiff's case on both theories."

THE EVIDENCE WITH MATHEMATICAL CERTAINTY SHOWED THE CONDITIONS WERE PRESENT WHICH WOULD NECESSARILY HAVE MADE THE LITTLE WATCHMAN FUNCTION WHEN THE FRONT TRUCKS LEFT THE TRACK.

It will be borne in mind that the little watchman simply applies the air brakes on the train by tripping a trigger which opens a valve when the front trucks leave the track. There is no difference between the way the watchman applies the air and the way the engineer applies it from his seat in the cab.

We have already quoted the evidence of Holcombe and Lunsford to the effect that beginning at the point of derail-

ment the flanges of the front wheels hit the same cross-tie in numbers of instances between the point of initial derailment and the point of final derailment. The front wheels on both sides could not have hit the same tie without having dropped 6¾ inches; the height of the rail. The first mark of the flanges on the ties was on the first three ties after the derailment, then on the seventh tie, then on the eighth tie, then on the ninth tie, the tenth, the eleventh, then on six ties from twelve to eighteen on both sides, and so on all the distance (record pages 62, 63). Not only this, but the mark of the left flange inside the rail at one place was eighteen inches from the rail (record page 63). This not only showed that the wheels had dropped the height of the rail but also that they had moved to one side eighteen inches. Either proposition would have set the brake because the frame was only five inches high, and even if the trigger had not been exactly in the middle of the frame (as it should have been), to drop 6¾ inches would have applied it, and as the frame was only eighteen inches wide a movement out laterally or to one side of eighteen inches from the rail, supposing the rod to have been somewhere near the middle of the frame, would have easily applied the brake.

The court left very fairly to the jury the question as to whether the conditions were present which should have made the watchman apply. The plaintiff proved those conditions with mathematical certainty. It was admitted by the defendant's master mechanic that with those conditions existing the watchman must have applied. It is true, after testifying on his direct examination that the watchman would have applied under those given conditions, that on the cross examination the master mechanic was somewhat vague, indefinite and evasive in his answers, but the true construction of his testimony was for the jury.

Goff testified on page 77 of the record:

> "Whatever the height of that rail is, when those trucks get off, that wheel would drop to the tie or the ballast, one or the other."

We call attention of the court to the photographs of the watchman in the record on pages 109, 110, 111 and 112. The apparatus is very simple. It merely depends upon the fall of the truck carrying down the frame in which is placed a trigger connecting with the air line. It applies the air exactly like the engineer applies the air from the cab.

Goff testified on pages 80 and 81:

> "As to there being any way to keep it from operating if the framework comes in contact with the trigger, from the construction of the valve, it would appear that it would have to work. It would operate, of course, to set the brakes."

Again Goff testified on direct, on page 81:

> "I don't know the height of the rail, but, supposing the height of the rail and the tie-plate under it is 5½ inches, and the trucks got off the track so as to make a mark on the ties, that truck frame would have to fall off the rail from 3 to 4 inches."

Further on, on page 82, Goff testified:

> "A new flange is one inch long; so that if the rail is 5 inches high, and that wheel gets off the rail, and that point of the flange hits the cross-tie and holds it up, that frame will have dropped 4 inches, the flange being an inch high; you take that inch from the 5 inches of the rail, and your frame would drop 4 inches; taking it for granted that the height of the rail and the tie-plate together is 5 inches, that would make that drop 4 inches."

Further on, on page 82, Goff testified:

> "We give much less play up and down vertically, that is only 5 inches, because if the truck drops, we want that to affect the trigger either way almost instantly if the truck gets off. The man that got it up intended to put it on there to stop the engine, instead of the brakes, in

case of a derailment; in case the first front truck got off. It only applies to the front truck, and the object was to apply the brake on the engine just as soon as the front truck got off."

We say that the foregoing testimony of the defendant's master mechanic Goff fits the exact facts of the instant case. It does not profit us to consider his vague answers on cross examination to the effect that the matter was in an experimental stage and that sometimes the device would set the brakes even when the conditions were not present which called for it. So far from this being in the defendant's favor, it is against the defendant. The general trend of this vague testimony on the part of Goff, as see page 86 of the record, is:

"I might say that we have had some delays to trains on account of this device setting, and that would then involve the necessity of increasing the size of the framework."

—and further on, on page 86:

"We have set them the same thing and had them to set the brakes in emergency on the line of road."

—and further on, on page 86:

"I know of one particular instance that we set the bracket the same distance as another engine of the same class, and it set the brakes in emergency on the line of road."

There does not seem to have been any complaint by the master mechanic on his cross examination that the brakes did not set in every instance where they should, but that often they would set when they should not. This is to err on the side of safety and does not benefit the defendant.

The petition in this case alleged that the conditions were present which should have set the brake, the petition alleging

on page 9 that the apparatus was designed to apply the brakes whenever the front wheels left the track and that the front wheels did leave the track and that (page 10) "had the said watchman functioned, the train would have been stopped long before striking said right hand switch and turning over, and the life of the decedent would have been saved." The second count alleged the same thing (page 14).

The plaintiff proved beyond controversy, as see the testimony hereinbefore quoted of Holcombe and Lunsford, that the front trucks were derailed; that the rail was 6¾ inches high; that the flanges of the wheels of the front trucks immediately began to strike the cross-ties, both flanges striking the same tie in numerous instances, which showed that the wheels had dropped the height of the rail; also that there were marks on the ties eighteen inches to the left of the rail, showing the wheels at times moved laterally eighteen inches, and that these marks continued 7/10 of a mile before the engine turned over and killed the engineer. All of these conditions the master mechanic said would have set the watchman. Of course, the plaintiff never contended that the watchman would have applied if the conditions did not exist which would have necessarily applied it. Even though the watchman at times may have functioned when it should not have functioned, still it was agreed on all hands that there were certain conditions that would have required it to function if the watchman had been in working order, and the master mechanic admitted they were the conditions which existed in this case.

THE DEFENDANT NEVER PRETENDED TO EXPLAIN WHY THIS WATCHMAN DID NOT FUNCTION. THE INFERENCE WAS OVERWHELMING THAT THE WATCHMAN WAS OUT OF CONDITION AND DEFENDANT MADE NO EXPLANATION OF ITS CONDITION.

The superintendent Madden showed in his statement, beginning on page 93 and on page 94 thereof (see record) that

he went immediately to the scene of this wreck, arriving the same afternoon, and made an inspection. He tells on pages 95 and 96 of examining the locomotive. He said there was an attachment on the engine known as Wright's little watchman. He did not say one word about the condition that that little watchman was found to be in on this engine. He was strangely silent on that subject. The master mechanic Goff came to the scene of this wreck the same day and took the watchman off and testified as follows on page 82:

> "I did not test this watchman after I took it off; I understand that Mr. Stewart, the superintendent of motive power, had it tested; I don't know it; I know they told me they did test it, that is all I know about that part of it. When I got there, the truck, as I say, was all laying over there; the truck part of it was all disconnected from the watchman part of it, from the trigger part; naturally, it would be. The trigger part of it, and the air pipe to the train line, had been taken off; Mr. Stewart had it taken off. It had been taken off when I got there; he had it taken off for the purpose, I understood, of having it tested."

And yet we have not a word in this record from Stewart, the superintendent of motive power, or anyone else on behalf of the defendant as to what condition this watchman was in. Why talk vaguely about whether the watchman on other occasions had functioned when it should not have functioned, when the defendant's agent had the watchman for a test, undoubtedly made the test, and did not show the court whether it was in condition or out of condition? The conclusion therefore is irresistible that the watchman must have been out of condition.

IN HIS CHARGE TO THE JURY THE JUDGE FAIRLY SUBMITTED THE DEFENDANT'S LIABILITY UNDER BOTH THEORIES, THAT IS, UNDER THE FIRST COUNT TO THE EFFECT THAT THE TRACK AND ROAD-BED WERE OUT OF CONDITION, AND THEN UNDER THE THEORY SET UP IN THE SECOND COUNT THAT THE LOCOMOTIVE APPLIANCE ACT HAD BEEN VIOLATED BY THE FAILURE OF THE LITTLE WATCHMAN TO FUNCTION WHEN IT SHOULD HAVE FUNCTIONED.

The judge told the jury on page 150,—

> " . . . and if the same (watchman) did fail to function and operate, and if its failure to so operate, because it was not maintained in good condition, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case."

Again on pages 150 and 151 the court charged,—

> " . . . and if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the train would have been stopped and the decedent's life would have been saved," etc., then the defendant would have been liable.

In other words, the jury understood fully that the defendant would not be liable unless this was a case in which the watchman should have operated, and that its liability depended upon whether its failure to operate was due to the fact that it was not in proper condition.

AS TO THE DEFENDANT'S CLAIM THAT THIS WATCHMAN WAS BUT AN EXPERIMENT AND SHOULD NOT BE CONSIDERED A PART OF THE ENGINE, WE MAKE THIS REPLY:

Undoubtedly the watchman was a physical part of the engine. The air brake line extended into the engine and this watchman with the trigger which opened the valve was as much a part of the engine as that part of the air brake line which sat in the engineer's cab and which the engineer applied. It was the same thing in principle. It gave the engine a degree of safety which an engine which did not have that appliance did not possess. The degree of safety which an engine possesses depends upon the type of that particular engine, and the type of that particular engine depends upon what the particular railroad desires it to be. The law does not require it to have any particular type of engine, unless the Interstate Commerce Commission has investigated and condemned a particular part of an engine which the railway puts on it and substituted another, and as long as the railway is allowed unmolested to add any particular parts to an engine or to use any particular type of engine, that particular part and that particular type of engine must be in good condition and must function properly.

We say that none of the decisions have recognized the contention that when an engine is out on the road running and hauling passengers, that any part of that engine placed thereon by the defendant for use in actual transportation can be called an experiment. Experiments should be conducted otherwise.

Again we refer to the master mechanic Goff who testified on page 78 of the record that the watchman had been used by the defendant five, six or seven years; that on this particular division it was used on the majority of engines; that this particular engine was equipped with it; that the company had been putting this appliance on the engines gradually; that all the passenger engines on this division were equipped with this

appliance; that the railroad at one time quit using them but then started to putting them on again and had been increasing them ever since. (See Goff's redirect examination, pages 86 and 87.)

Certainly a mere conclusion of a witness that an appliance was an experiment in the face of such specific testimony as this would have raised a jury question and would have required the jury to find that this appliance was no experiment but had become a regular operating part of this engine.

An experiment should be used only on one engine. An experiment would hardly be used five to seven years. An experiment would hardly be used on every engine every day for at least five years in passenger traffic which was carrying on defendant's business. But as the defendant had made this claim that this appliance was an experiment, the judge submitted that issue to the jury as a question of fact, and the intimation of the Georgia Court of Appeals was that this was certainly not error against the defendant, implying that it was error in favor of the defendant. The judge in his charge gave the jury the benefit of the defendant's answer setting up this experiment contention, in the following language:

> "The defendant contends that the device known as Wright's Little Watchman is really in an experimental state, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and therefore it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as contended, was simply an experiment, and this limited or experimental use was such that the de-

cedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly."

ARGUMENT IN REPLY TO THE PETITIONER'S LEGAL CONTENTIONS IN ITS BRIEF.

(1)

DEFENDANT CONTENDS APPARENTLY THAT NOTHING CAN BE A PART OR APPURTENANCE OF AN ENGINE WHICH THE DEFENDANT IS REQUIRED TO KEEP IN PROPER AND FUNCTIONING CONDITION UNLESS IT IS SPECIFIED BY AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

We deny this. The Safety Appliance Act as to locomotives is found in Section 23 of the Safety Appliance Act as finally amended by the Act of 1915, as see page 79 United States Code Annotated, Title 45, Section 23. This Act provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive, unless such locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," etc.

That this little watchman is a part and appurtenance of this engine is too clear to require argument. As before stated, we refer the court to the photographs which appear in the record. The appurtenance is on the engine. It is in the very front part of the engine, approximately forty feet ahead of where the engineer sits. It is as much a part of the engine as the driving wheels or the pilot or the electric headlight or the air brake which the engineer puts on from his cab. Indeed it is the air brake, and instead of operating by the engineer's hand it operates by a fall of the trucks which strike a stem.

The law does not undertake to tell the railroad what it must put on the engine (unless the Interstate Commerce Commission has previously acted as to some part of the engine which it has condemned or arbitrarily orders another part) but leaves that to the railway company.

The first portion of Section 23 lays down the duty of the railway, as to every part and appurtenance of the locomotive which as a matter of fact is on the locomotive, to keep it in proper condition.

Then follows a further provision making it unlawful to use a locomotive "unless said locomotive, its boiler, tender, and all parts and appurtenances" are inspected as provided in Sections 28, 29, 30 and 32. This does not mean that the railway has lost its right to equip the locomotive with its own appliances. It must be inspected and parts of it may be condemned, but as long as it is not condemned, these parts may be used.

Sections 28, 29, 30 and 32 of the Boiler Inspection Act providing for inspection merely give the Commission power to make rules for the inspection of locomotive boilers; that before these rules are changed they must be approved by the Interstate Commerce Commission; that the Chief Inspector shall make all needful rules; the duties of district inspectors are provided for, requiring a personal inspection of all locomotives, and the inspectors are given the same power with respect to all parts and appurtenances of the locomotive that they previously had as to the boiler.

Section 31 requires the Chief Inspector to make an annual report, and Section 32 requires reports as to accidents.

There is nothing whatever in these provisions as to the power to make inspections which in the remotest way relates to such an appurtenance as this little watchman.

A penalty is placed upon a carrier which uses a locomotive without this inspection or in violation of this law.

The defendant in this case has not in any way attempted to show that it complied with any order of the Interstate Commerce Commission as to this watchman. Indeed its claim is that it was a superadded part on the engine put on for safety by the defendant itself without its being required by law to do it; whereupon we say that putting the part on the engine made it then and there a part and appurtenance of the engine. Until the Interstate Commerce Commission should have acted on this watchman, either forbidding it or making a substitute for it, this watchman remained as a part and appurtenance of the engine placed there by the defendant and for which the defendant is responsible.

The United States Supreme Court in Illinois Central v. Williams, 242 U. S. 462, had the Safety Appliance Act before it. That Act required that freight cars having ladders should be equipped with secure hand holds or grab irons on the roofs at the top of such ladders. This requirement was set forth in Section 2 of the congressional enactment. In Section 3 it was provided that within six months after the passage of the Act the Interstate Commerce Commission should designate the number, dimensions, location and manner of application of the appliances provided for by Section 2 of the Act, and it was further provided that the Commission had full power to postpone compliance by any carrier with the provisions of this section. The railway contended (very much as is contended here) that until the Commission fixed all the dimensions for the ladders and the hand holds and their exact locations, the statute did not of its own terms require secure and safe hand holds above the top of the car but rather depended upon some action by the Commission. This contention was rejected by the Supreme Court which held that the language in Section 2 that all cars used by any carrier requiring ladders should be equipped with such ladders and also with secure hand holds or grab irons on their roofs, was an absolute requirement effective at the time the Act went into operation, and that even though the Commission could make specifications exactly as to where these ladders should be and their exact dimensions,—that still the Act by its own terms

required that there should be a secure hand hold on the top of the roof and that no amount of authority given the Commission to postpone the operation of these particular specifications could affect the primary requirement of the Act. The Supreme Court used the following language:

> "The claim of the defendant railway companies with respect to these two sections is built up wholly upon the assertion, it cannot properly be called argument, that because, in the part of section 3 just quoted, reference is made to section 2 for a description of the safety appliances to be standardized, therefore the whole of section 2 must be treated as so incorporated into section 3 as to be comprehended within the expression of the proviso giving power to the Interstate Commerce Commission to extend the period within which any common carrier 'shall comply with the provisions of this (the 3d) section,' etc., and that section 2 was therefore suspended until July 1st, 1916, by the Commission's order of March 13, 1911.
>
> "That this strained and artificial construction of the section cannot be allowed may be made clear by a brief consideration of the terms and purposes of the two sections of the act.
>
> "The congressional purpose in enacting section 2 of the act is very plain. At the time the act was passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure hand holds or grab irons on their roofs at the tops of such ladders, and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative duty, of making them 'secure,' and to enforce this duty by appropriately severe penalties. Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612."

And further on the court also used the following language:

> "To change these safety appliances on all the cars in the country from what they were as contemplated by section 2,—'secure,' but differing, 'in number, dimensions, location and manner of application,'—to what they must be when standardized to meet the requirements provided for in section 3, was regarded by Congress as a work so great and so expensive that it wisely committed to the informed discretion of the Interstate Commerce Commission the power and duty of determining the length of time which the carriers should be allowed in which to accomplish it. To give this discretion to the Commission is the function, and the only function, of the proviso of section 3, and the claim that, by construction, power may be found in it to suspend section 2, is too forced and unnatural to be seriously considered.
>
> "This reading of the two sections makes them stand together as an expression of a consistent congressional purpose 'to promote the safety of employees and travelers on railroads' on and after July 1st, 1911, by requiring that the safety appliances described in section 2 of the act shall be secure and efficient from that date, and by requiring, as section 3 provides, that these appliances shall be brought as speedily as may be to a uniform standard of location, size, and usefulness, to be prescribed by the Interstate Commerce Commission."

It will be noted that in this Williams case the law made no specifications but required only safe and secure hand holds. It was held this was sufficiently definite legislation.

So in our case Section 23 requires whatever becomes a part and appurtenance of this locomotive to be in proper condition. This is the basic law. As long as the Commission allows these appurtenances to be on the engine they must function. Perhaps the Commission could require them to be taken off or could require something to be substituted in their stead, but until the Commission so acts, this locomotive has this

watchman as an appurtenance which must be in proper condition and function.

In the case of Western & Atlantic R. R. v. Meister, 37 Ga. App. 570, this same contention was made that the Interstate Commerce Commission must have made a rule or acted before there could be any duty, and the question in this Meister case was as to hand brakes, which the statute required to be "efficient," and on page 575 of 37 Ga. App. in said case the court said:

> "We cannot agree that it was necessary for the plaintiff to allege and prove the violation of any rule of the interstate commerce commission. The authority granted to that tribunal under the provisions above quoted conferred no power to dispense with a compliance with the statute as to the equipment of cars with efficient hand brakes. Upon this point it was sufficient to allege and prove that the particular car was not so equipped. The plaintiff's right to recover depended upon proof of a violation of the statute, and not of a rule of the interstate commerce commission. While it is the duty of the interstate commerce commission not only to provide for standardization, but also to enforce the provisions of the act, a compliance with its orders would not necessarily be a compliance with the statute. The observance of reasonable regulations promulgated by that authority would in every case be the minimum of what the railroad should do within the law, but might not be the maximum. The commission could not require less than 'efficient hand brakes.'"

Opposing counsel quote the case of B. & O. R. R. v. Groeger, 266 U. S. 521. In reply we beg to state that this case is very strongly in our favor. In this Groeger case the decedent was killed by the explosion of a locomotive boiler. The plaintiff contended the defendant railway was negligent in failing to equip the engine with a fusible plug in the crown sheet. It will be observed that this complaint of negligence

or inefficiency went entirely to the construction of the engine. It was not claimed that there was a fusible plug in the crown sheet which was in bad order or which would not function. It was simply claimed that the engine should belong to that type which had a fusible plug in the crown sheet. The objection went entirely to the construction of the whole engine in that it omitted a part which was claimed to be necessary for its safety.

We call attention here to the fact that Section 23 of the Safety Appliance Act requires the defendant to have in proper condition all the parts and appurtenances of the engine. A part and appurtenance which is not on the engine need not be in proper condition. There was no fusible plug in the crown sheet in the Groeger case. The defendant had decided it did not want that type of engine.

Right here we refer to the automatic bell ringer case of Hines vs. Smith, 275 Fed. 766. Had there been no automatic bell ringer it would not have been a part and appurtenance of the engine and therefore nothing need be said about it or could be said about it, but having been put on the engine and employees having been led to work in connection with it and rely upon it, it must be in proper condition and must operate.

Resuming consideration of the Groeger case, we call attention to the language of the Court which sustains our position precisely. The judge below had submitted to the jury in the Groeger case the question of whether there had to be a fusible plug in the crown sheet. To compare that with the case at bar, we will suppose the engine in question had not been equipped with Wright's Little Watchman. If the plaintiff had alleged that the defendant should have equipped the engine with Wright's Little Watchman, then the same question exactly would have arisen that did arise in the Groeger case. The railroad could reply: "We did not desire that type of engine. We did not have that on the engine as a part and appurtenance thereof. You cannot complain of our

being negligent as to something which never has been a part of the architecture and construction of that engine. The law does not require it to be on or off the engine." Such a reply would have been justified by the Groeger case because the Groeger case went solely on the question that there was no fusible plug employed by defendant in the crown sheet and that therefore it had not become a part and appurtenance of the engine.

Judge Butler, in writing the opinion in the Groeger case, used this language in reference to the Safety Appliance Act:

> "The jury was by the charge (the charge submitted to the jury was that the defendant should have put a fusible plug in its crown sheet under the safety appliance law) authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. There is nothing in the act or in any rule, regulation or order authorized by it, which specifies the use of fusible plugs."

Further on, the court said:

> "It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition."

Another case which the defendant quotes is United States v. Southern Railway Company, 1 Fed. (2) 487.

This was a mere criminal prosecution under the second provision in Section 23 on page 79 of 45 U. S. C. A. of the Safety Appliance Act. The railroad was prosecuted for failing to comply with the rules and regulations promulgated by the Interstate Commerce Commission as to the condition of each locomotive and was prosecuted for using a locomotive "when the monthly inspections and tests of said locomotive and tender and other parts, as required by said act and said

rules and regulations made pursuant thereto, had not been made by the defendant, and the monthly report of and concerning the inspection of said locomotive and tender and other parts had not been filed, as provided by said act."

The important thing held by the court was that "Each use of a locomotive after time for inspection constituted a separate offense." The company was fined therefore for eleven violations $1100.00, or $100.00 each.

We have never in any way contended that orders by the Interstate Commerce Commission are not valid and also that the use by the defendant of a locomotive after failure to inspect it as required is a penal offense.

This will still leave in force the independent enactment of Congress that every part and appurtenance of the locomotive must be in proper condition.

Petitioner also quotes United States v. B. & O. R. R., 293 U. S. 454. This was a criminal prosecution and merely held that a rule by the Interstate Commerce Commission which required carriers to substitute power operated for hand operated reverse gear, if the latter is found by the Commission to prevent unnecessary peril to life or limb, is within the scope of the Commission's power. We have never denied that the Commission has power to order disuse of many parts of a locomotive which a railroad might use and substitute something else. No such question is raised here, but until the Commission does act, the company remains under a duty to see that all parts on the locomotive or which are put on the engine and which have not been condemned are properly functioning.

(2)

PETITIONER MAKES THE CONTENTION THAT THE USE OF THE WATCHMAN COULD NOT POSSIBLY CAUSE UNNECESSARY PERIL TO LIFE OR LIMB OR IN ANY WAY IMPERIL THE SAFETY OF THE LOCOMOTIVE, BUT ON THE CONTRARY ADDED AN ELEMENT OF SAFETY. PETITIONER MISUNDERSTANDS OUR POSITION IN RESPECT TO THIS CONTENTION.

We respectively answer that the locomotive appliance enactment does not rest upon so narrow a construction. This court has held time and again that these laws are to be liberally construed in favor of life and limb. We say that the inventions of science add an element of safety to the engine which employees and passengers are entitled to as an obligation.

Could it be argued that the air brake on the engine and train operated from the cab by the engineer is a mere added element of safety to that train which need not be kept in proper condition and that it not only does not imperil life and limb but adds to the safety of the employees and passengers? The air brake in the hands of the engineer is exactly like this watchman. Indeed they are identically the same thing.

This little watchman made that particular locomotive a different locomotive from one without it, just as the air brake in the engineer's hand made it a different locomotive from one operated by a hand brake. It made the locomotive a safer locomotive. It could stop more quickly and with less effort. When the front trucks got off, even if the engineer or fireman could not see the disaster, this appliance acted. The degree of safety which that locomotive possessed depended upon whether all of its parts and appliances functioned. The safety of the crew and the passengers was unnecessarily imperiled if that appliance which was put on that engine was out of con-

dition. The crew knew of that appliance and contracted with reference to it. They were just as much imperiled if that appliance failed to function as if any other appliance on the engine failed to function, whether it be the automatic bell ringer, the steam brake on the drivers, the electric headlight, or anything else.

(3)

THE LOCOMOTIVE IS CONSIDERED BY THIS LOCOMOTIVE APPLIANCE STATUTE AS JUST AS SAFE AS ALL THE PARTS AND APPURTENANCES ON IT MAKE IT WHEN THEY FUNCTION PROPERLY, AND THAT DEGREE OF SAFETY IS IMPERILED WHEN THEY FAIL TO FUNCTION. IN THE GENERAL SENSE OF THIS STATUTE, THE ENGINE MUST BE SAFE TO OPERATE IN THE SERVICE TO WHICH IT IS PUT. IN OTHER WORDS, WITH THE APPURTENANCES PLACED BY THE CARRIER ON THE ENGINE, THE DEGREE OF SAFETY WHICH WOULD RESULT IF THOSE APPLIANCES FUNCTIONED PROPERLY MUST BE MAINTAINED.

It is true the train could run without the air brake with a certain degree of safety, but that degree of safety would be much lower than the degree which would exist if the air brake worked. The presence of the air brake elevates the engine to a standard of safety above the hand brake standard of safety. It is a standard established by the defendant itself which it must maintain. This is what this statute means by the language "safe to operate in the service to which the same are put" and the further language that the same may be employed in the active service of the carrier without "unnecessary peril to life or limb."

We say that under this statute safety is a relative term. The error into which opposing counsel falls grows out of failing to maintain this distinction. The engine must be safe to oper-

ate in the service to which it is put in view of the requirement that all of its appurtenances must be in proper condition. What would have been considered safe in the way of mechanical inventions fifty years ago would be considered very dangerous now. Certainly the railway company cannot complain after having erected its own standard of safety. It seems to us to be a far cry for the railway to claim that a rule of this sort would discourage the railway in putting safety appliances upon its engines.

We say, therefore, that defendant's contention that the use of the watchman would not cause unnecessary peril to life or limb is beside the question; that this language is used in connection with the requirement that the locomotive and all its parts and appurtenances must be kept in proper condition and safe to operate in the service to which it is put; that the language is used in connection with the standard of safety fixed by the defendant itself in putting parts and appurtenances on the engine, and the law endeavors to keep up that standard of safety to what it would be if all those parts and appurtenances functioned.

(4)

ANY PART OR APPLIANCE ON THE ENGINE OR TENDER, NO MATTER WHAT OR WHERE IT IS, MUST BE KEPT IN PROPER CONDITION. CASES EXAMINED.

See the case of Lehigh Valley R. Co. v. Beltz, 10 Fed. (2) 74, in which a certiorari was denied by the Supreme Court, as see 270 U. S. 641. This case gives a history of the amendments to the Boiler Inspection Act and on page 75 says that the amendatory act of 1915 declared that the act of 1911 should "apply to and include the entire locomotive and tender and all their parts and appurtenances." The court went ahead to say:

"In the instant case the trial judge was of the opinion

> that the act made it the absolute duty to use only locomotives which are in all respects safe. If an unsafe locomotive should be used and injury resulted, the loss had to fall somewhere and Congress made it fall on the carrier, whether the latter was at fault or not. The acts, in his opinion, made the carrier 'an insurer against all defects of its rolling stock.' He refused to charge that 'the mere breaking of this pin (in the locomotive) does not establish a violation of defendant's duties, under the so-called Boiler Inspection Act, as amended, or establish a cause of action in favor of plaintiff.' He therefore instructed the jury that the only question of fact for them to consider was the question as to the amount of damages."

This charge of the District Court was affirmed by the Court of Appeals in 10 Fed. (2) page 74, and headnote 4 of this case reads as follows:

> "Boiler Inspection Act Feb. 17, 1911, as amended by Act March 4, 1915, imposes on carrier in interstate commerce an absolute duty to keep its locomotives free from defects and absolutely safe to operate; 'absolute duty' meaning one not subject to any limitation or condition, positive and not dependent, and unqualified by any considerations whatsoever."

That an appliance on an engine or cars under the Safety Appliance Law must absolutely function and that no amount of diligence in attempting to keep those parts in repair or working order will excuse the railway has been held in the Taylor case, 210 U. S. 281, and the C. B. & Q. case, 220 U. S. 559, and the Delk case, 220 U. S. 580.

In the case of Hines v. Smith, 275 Fed. 766, the engine was equipped with an automatic bell ringer which could be applied by the engineer, and the railroad contended that this automatic bell ringer was not a part and appurtenance of the locomotive. The action was brought by an employee who was

injured while crossing the tracks and his contention was that if the automatic bell ringer had been working and the bell ringing he would have been warned of the approach of the engine and would have escaped injury. The company was held liable because the automatic ringer would not work. The court held that the bell ringer was a part or appurtenance of the locomotive and tender within the meaning of this law, and the court said:

> "We have no hesitancy in saying that the hand operated bell cord cannot be accepted as a substitute for an automatic bell ringer. If the engine is equipped with an automatic ringer *which is out of repair,* we fail to see how some other means, not automatic, will meet the requirements of the statute."

It seems to us that the case just quoted is conclusive. The engine need not have been equipped with this automatic bell ringer. There was no contention that it was required. There was a rope by which the fireman could have rung the bell, but it had something extra on its engine. It gave a kind of super-touch to the safety side of the question by putting this automatic ringer on. Having put it on, it was its duty to see that the automatic ringer remained in repair. The defendant increased its duties and its own standard of safety by adding this superlative equipment.

In Kilburn v. Chicago, etc., Ry., 232 S. W. 1017, from Missouri, it was held that a broken piston rod resulting in the escape of a large quantity of steam into the cab of the locomotive is within the law as being a part and appurtenance of the locomotive.

In the case of Fredericks v. Erie R. Co., 36 Fed. (2) 716, the Circuit Court of Appeals of the Second Circuit held that a drain cock on the locomotive designed to be closed by hand was a part of the locomotive and that the railroad had the duty to see that the drain cock was fitted to the engine and maintained in such a way that application of manual force by

an employee in an attempt to close it would not pull it loose. The court, in the opinion in the Fredericks case just being quoted, said that the drain cock must be fitted to the engine and maintained in such a way that it would not pull loose in an attempt to close it; that it was to be expected that the employee would pull as hard as he thought necessary within the limit of his strength; that after trying to close it with one hand it was perfectly natural for the plaintiff to use both hands; that it was no excuse for the railroad to say that the servant was too strong and heavy for the job; that common knowledge establishes the fact that a pet cock constructed for the use which this one was constructed for can easily be made, fitted, and maintained in such a way that if the valve in it cannot be closed by hand, neither the drain cock nor the fitting will be broken loose by an attempt at manual closing, and this is so because the law requires appurtenances on the locomotive to be "in proper condition and safe to operate" and that for failure to comply with this law the railroad is liable without showing negligence.

In the case of S. A. L. v. D'Avignon, 41 Ga. App. 263 (in which certiorari was denied by the Supreme Court of the United States in 283 U. S. 827), it was held, as appears in the second headnote, that the things out of condition about that locomotive were the tank sill, the draw bar and the draw bar pin. The Court of Appeals held the duty to keep these appurtenances "in proper condition at all times and under all circumstances" was on the carrier and that it could not escape the duty by showing it had exercised reasonable care, and that contributory negligence by the injured employee is no defense, nor is assumption of the risk any defense.

(5)

GENERAL SUMMARY

The judge was abundantly fair to the railway company when he submitted to the jury the question of whether the watchman had become a part and appurtenance of the engine or whether it was a mere experiment. We have already quoted the master mechanic's uncontradicted evidence that it had been used from five to seven years on every passenger engine on this division of defendant's railway. Certainly the defendant cannot complain when this issue of fact was submitted to the jury. Certainly the judge was very cautious in submitting to the jury the question of whether the conditions existed in this case which should have caused the little watchman to function and whether its failure to function was due to the fact that it was not in proper condition, and in further submitting to the jury the further question of whether, had it operated, the train would have been stopped and the decedent's life have been saved.

The fact that this device may not have been in general use on other railroads is no defense to the defendant. The defendant is bound by the equipment which it placed on its own engine if it had one of an unusual type. It had elevated itself up to a standard of safety with this device on it which it was bound to maintain by keeping that device in proper condition. Employees who knew of that device on the engine could well claim that they accepted their positions knowing that that device was on the engine and relying upon it.

A standard of safety can be maintained by some instrument which prevents a dangerous condition from producing a fatal result. Indeed most safety appliances are to save human life against sudden dangerous conditions which develop.

To sum up,—we quote the following cases which apply to various parts of a locomotive, to-wit:

Any part of a locomotive is a part or an appurtenance there-

of, and the same has been held to apply in the D'Avignon case, 41 Ga. App. 263, to the tank sill, the draw bar, and the draw-bar pin on the tender of a locomotive; in Hines v. Smith, 275 Fed. 766, to an automatic bell ringer; in Wyatt v. N. Y., etc., R. R., 45 Fed. (2) 705 (4), to the failure to have a rear light on a locomotive; in the Beltz case, 10 Fed. (2) 74, to the driving rod on a locomotive which broke; in 36 Fed. (2) 716, a drain cock on a locomotive to be closed by hand maintained in such way that application of manual force by employee in an attempt to close it would not pull it loose.

In conclusion we say that the verdict in this case was very moderate, only $5,000.00 for the death of an engineer 59 years old, who earned more than that amount in two years' service.

We say that under a perfectly fair charge, submitting to the jury all the contentions of the defendant, that the jury found against the defendant. The Court of Appeals of Georgia, in a very able opinion, affirmed that judgment. The Supreme Court of Georgia, upon petition for certiorari to the Court of Appeals, declined to grant a certiorari.

We say that the defendant has had the full measure of its rights in respect to this very moderate verdict, and in concluding we refer the court to the charge of the court beginning on page 136 of the record and ending on page 154, and to the opinion of the Court of Appeals of Georgia beginning on page 155 of the record and ending on page 164.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, Deceased, Respondent.

BRIEF FOR RESPONDENT

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Respondent makes a statement of the facts, not being satisfied with petitioner's statement of facts 1

The evidence showed with reasonable certainty that all the conditions were present which would have made the watchman function when the front trucks left the track—provided the watchman was not out of repair 3

The defendant never pretended to explain why this watchman did not function; the defendant had it examined after the wreck but neither the witness making the examination and indeed no other witness made any explanation whatever of whether it was in functioning condition; the inference was overwhelming that the watchman was out of condition and that that must have been the reason why the defendant made no explanation of its condition 9

In his charge to the jury the judge fairly submitted the defendant's liability under both theories, that is, under the first count to the effect that the track and road-bed were out of condition, and then under the theory set up in the second count that the Locomotive Inspection Act had been violated by failure to keep the watchman in proper condition 10

Defendant set up in its answer that watchman was an experimental device designed under certain conditions to apply the brake; that the same was in good condition but proper conditions did not develop to cause tripping the valve; judge charged jury on defendant's contention that if watchman was only an experiment and was not intended to be a permanent part of the locomotive so as to authorize employees to rely on the working

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and operation of it that its failure to work or perform its functions could not be charged against defendant as negligence and it would not be liable for failure on part of device to operate properly; we contend that this charge gave defendant the benefit of every question of fact it had any right to rely on and that the charge was too favorable to defendant railway..... 12

Safety Appliance Act applies to every part and appurtenance of locomotive, boiler and tender and requires the same to be in proper condition; defendant's contention that Locomotive Inspection Act does not apply to watchman answered; Locomotive Inspection Act discussed and nothing in the act or in the rules of the Interstate Commerce Commission or in any decision of any court apply the requirement that all parts and appurtenances of locomotive, boiler and tender be kept in proper condition to anything less than all parts and appurtenances which are actually on any locomotive operated by a carrier..... 16

Rules of commission quoted and discussed and the commission in providing for specific devices or other construction characterizes its rules as only the minimum requirements under the act; these rules encourage the carrier to enforce additional rules not inconsistent with the commission's rules tending to a greater degree of precaution against accidents; these rules provide for many automatic devices on railways which function only when some particular condition arises; these rules hold the carrier responsible for the general construction and maintenance of the locomotive and hold the railway's mechanical officer responsible for inspection and repair "of all parts of locomotives and tenders under his jurisdiction;" these rules require that each locomotive shall be inspected by the carrier's agents after each trip or day's work; the act itself requires district inspectors to make personal inspections from

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time to time to carry out the provisions of the statute and various other provisions are referred to showing that even though this particular device, the watchman, had not been required or referred to by name that the general rules as to keeping in repair and inspecting promulgated by the commission covered it as well as every other part of the locomotive 20

Nothing in Locomotive Act limits requirement of "proper" parts to less than all parts of locomotive; no decided case limits requirement of keeping parts "in proper condition" to those commission has required to be put on engine 24

All defendant's contentions in its petition for certiorari are taken up one by one and answered 26

First contention is that watchman is unreliable and will only operate under certain favorable conditions; we say the proof shows these conditions existed and refer to the portions of the evidence which so show 26

Ground 2, p. 13, of defendant's petition is that no such device is required or even mentioned in the Safety Appliance Act, the Boiler Inspection Act, or other acts or the rules of the commission and it is stated that this court will doubtless take judicial cognizance of these rules and regulations; we say it is covered by the general words "all parts and appurtenances" and needs no further description 29

Cases on Safety Appliance Laws discussed; all apply general requirement of act as to proper or safe conditions of parts and appurtenances on locomotive or car; all hold that if appliance fails to function under proper conditions it is defective; requirement of proper condition independent of action by commission 31

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Ground 3 on page 14 of the petition for certiorari quoting 45 U. S. C. A., Section 23, claims that the act applies only where the use of a part or appurtenance would cause unnecessary peril to life or limb unless it was in proper condition and safe to operate; answered 38

The next ground in paragraph 3, on p. 14, petition for certiorari, is that Section 23 does not apply to a device which could not possibly endanger the locomotive but might possibly add to the safety of the train if the proper conditions developed causing it to operate; if this contention were sound every safety device on the locomotive would be excluded from the statute's requirement of being in "proper condition" 39

The next contention under paragraph 3, on p. 14, of petition for certiorari is that Section 23 applies only to such parts as are required to be inspected in accordance with rules adopted by the commission under the provision of the Boiler Inspection Act and to meet the tests prescribed in the rules and regulations and does not apply to a device not required to be inspected or tested; this contention fully answered and the provisions of the act, independently of any action of the commission, require every part and appurtenance of locomotive to be in proper condition 40

Paragraph 4, on page 14, of petition for certiorari contends that the Boiler Inspection Act merely requires a condition which will permit use of the locomotive without unnecessary peril to life or limb; we say with the watchman on the engine the peril from derailment of front trucks was an unnecessary peril; it was only a peril if the watchman failed to function 44

Paragraph 5, on page 14, of petition for certiorari contends that unless specified in the act the rules and regulations prescribed by the commission fix the standard;

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but even these, while constructed as required by the rules and regulations, must still be kept in proper condition and the rules only fix the standard so far as they go; devices not covered by the rules are still parts of the locomotive and must be in proper condition 44

Paragraph 6, on page 15, of the petition for certiorari argues that if the device (watchman) had never been applied to this locomotive the locomotive would have fully complied with all requirements of federal law and yet the accident would have happened; that with the device actually applied, but failing to set the brakes, the locomotive was in exactly the same condition it would have been in if the device had never been placed on it and would have as fully complied with all federal safety requirements; that liability has been imposed upon petitioner merely because it vainly attempted to do more than the law required; defendant loses sight of the fact that it added a part to that engine which made it a safer engine; presumably employees and even passengers rely for protection upon all the equipment placed on the engines; by adding this safety appliance to the engine the defendant increased the standard of safety for that locomotive; certainly the device became a part and appurtenance of that locomotive 45

The locomotive is considered by the locomotive appliance statute as just as safe as all the parts and appurtenances on it make it when they function properly, and that degree of safety is imperiled when they fail to function. In the general sense of this statute, the engine must be safe to operate in the service to which it is put. In other words, with the appurtenances placed by the carrier on the engine, the degree of safety which would result if those appliances functioned properly must be maintained 46

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Further reply to specific contention in defendant's brief that as commission cannot make a rule requiring specific device without a basic finding that the use thereof is required to remove unnecessary peril to life or limb that it follows the voluntary use of a device which could not endanger the operation of the train and therefore could not cause peril to life or limb would not be the use of a part within the meaning of the Locomotive Act. We answer that this requirement as to basic finding has nothing to do with the defendant's putting device on engine; that the very rule of the commission encourages the carrier to adopt rules for safety devices; that the carrier's act in placing on engine a new device may just as much as the commission's ordering a new device be for the purpose of removing an unnecessary peril; that any device placed on engine against what would otherwise be a peril such as derailment of front trucks makes that peril unnecessary 47

The requirement of a proper condition is complete within itself. We know from an inspection of the rules that the inspections and tests are required as to comparatively only a few parts; would this law require only a few of the parts of the locomotive to be in proper condition and leave all the other parts, many of them pertaining to safety alone (and safety is the main purpose of the statute) to be in improper condition? Is not a more reasonable construction of this statute to say—the number of parts to be in proper condition is every part of the locomotive which in any way relates to its safety; the commission can require to be inspected every part of the locomotive; it cannot lessen the number required to be in proper condition by making only a few parts subject to inspection and test 49

Under safety appliance statutes as to cars, it has been held by this court that requirement of "secure" hand

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holds and "efficient" hand brakes was sufficiently definite as a statutory duty and no action by commission could lessen the duty fixed in the act; also it has been so held in a second case quoted in defendant's brief; these cases are the only cases found by us in which a contention similar to that of defendant in this case has been made, and both decisions were adverse to that contention 51

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IN THE

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No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, Deceased, Respondent.

BRIEF FOR RESPONDENT

RESPONDENT MAKES A STATEMENT OF THE FACTS, NOT BEING SATISFIED WITH PETITIONER'S STATEMENT OF FACTS

In this brief we will call the railway company the defendant and the administratrix the plaintiff.

Cox was an engineer upon a passenger train running from Birmingham, Alabama, to Atlanta, Georgia. At a point in Georgia about one mile from Bremen, the front trucks of the engine left the track. Neither the engineer nor the fireman knew the trucks were off the track. The engine ran apparently with all wheels on the track, as far as the crew knew, for seven-tenths of a mile. All this time the wheels of the derailed front trucks had descended from the rail which was 6¾ inches high to the crossties and for the distance of seven-

tenths of a mile, as the marks showed, struck the ties at repeated intervals. After the engine had run approximately seven-tenths of a mile it struck a switch and the derailed front trucks coming in contact with the switch caused the derailment and overturning of the engine and the death of the engineer Cox. The administratrix of Cox brought this action to recover damages for his death.

The case was brought upon two theories—First, negligence in reference to the condition of the track, road-bed and right-of-way caused the initial derailment and not the small rock claimed by the defendant to have been placed thereon by a negro child; second, defendant had equipped its engines with an appliance known as a "watchman," which should have applied the air brake whenever the front trucks left the track and dropped down as far as 2½ inches or moved to one side 9 inches, and which should have stopped the train before the final derailment and wreck.

There was abundant evidence that the track was out of condition, that the ties were rotten, that they were insufficiently spiked at both the place where the original derailment occurred and where the second derailment occurred. We refer the court to the photographs on pages 103, 107, 108 and to the testimony of Lunsford on pages 56, 57 and 58 of the record.

There was evidence that the rock or sandstone alleged by defendant to have been put on the track by the little negro boy did not derail the engine. The witness Holcombe, on page 62, who got to the scene right after the wreck, testified that there was just a little pile of sand rock crushed on the rail, "no great sight, a small amount, I think there wasn't much more than two handfuls, I don't think there was."

The witness Goree, who was the fireman, testified on page 49 that the engine would crush such a rock without derailment; that he had often run over rocks and his engine was never derailed.

The witness H. A. Cox testified (record page 70) to the effect that he had picked a sand rock up near the place of this wreck; that Holcombe, the deputy sheriff, was along when he found the rock; that he had been a fireman for years; that he never had anything like that to derail trains; that he had run over rocks many times with trains; that when a rock is struck by an engine weighing 140 or 160 tons it would knock it off but if it hit it it would crush it, "That rock crushed up is almost the same as common sand. You sand the track to keep the engine from slipping when starting the train." (Record page 71.)

The Court of Appeals of Georgia in its opinion held that there was evidence to support the verdict on both counts of the petition, that is, on the defective track and road-bed and on the failure of the little watchman to function, the language of the Court of Appeals on page 163 being as follows:

> "There were two theories in the case, one of negligence and the other based on the safety-appliance laws, and the judge properly separated these theories and instructed the jury as to the same. None of the special assignments of error show any error as against the defendant. There was evidence tending to substantiate the plaintiff's case on both theories."

THE EVIDENCE SHOWED WITH REASONABLE CERTAINTY THAT ALL THE CONDITIONS WERE PRESENT WHICH WOULD HAVE MADE THE WATCHMAN FUNCTION WHEN THE FRONT TRUCKS LEFT THE TRACK—PROVIDED THE WATCHMAN WAS NOT OUT OF REPAIR.

It will be borne in mind that the "little watchman" simply applies the air brakes on the train by tripping a trigger which opens a valve in the air line when the front trucks leave the track. There is no difference between the way the watchman

applies the air brake and the way the engineer applies it from his seat in the cab.

There is no complaint of error here except that the judge submitted to the jury the question as to whether the watchman was in proper condition as required by the Locomotive Inspection Act.

That the evidence supported the theory that the watchman should have applied the air, and did not apply it, and that had it functioned the train would have stopped in two hundred yards after the initial derailment (whereas the train ran seven-tenths of a mile) is shown by the testimony of Goree, who testified on page 48 that if the air had been applied at the initial derailment the train would have stopped in fifteen car lengths of forty feet to the car, which would make six hundred feet or two hundred yards; by the testimony of Lunsford that beginning with the initial point of derailment throughout the entire seven-tenths of a mile, the wheels of the front trucks dropped down from the top of the rail to the cross-ties where marks were made by both of the wheels on many of the ties (Lunsford, pages 55, 56 and 57); by the testimony of Holcombe to the effect that the rail was 6¾ inches high (record page 63), that the mark of the flanges of the front wheels began at the point of derailment opposite the negro church (record page 62) and that the mark of the front wheels on both sides was on the cross-ties from the point of initial derailment to the final turnover (showing as a physical fact that the trucks had dropped 6¾ inches and allowing one inch for the flange had dropped a net distance of 5¾ inches).

It was shown by the fireman Goree and by all the train crew, Davis and Dowdle, that no brake was put on at the initial derailment or during the seven-tenths of a mile when the engine was running on the track with the front wheels off (see Davis, conductor, page 87, and Dowdle, baggage man, page 89 of the record). Goree, the fireman, said at the final

turnover, after the engine had run with the trucks off for seven-tenths of a mile, the engineer, when the entire engine got off the rails and headed in on the sidetrack, which was the time of the final turnover, put on his air brakes (record p. 47). Neither the engineer nor fireman had discovered, or could discover, the first derailment of the trucks, as the engine was running apparently normally.

We have already quoted the evidence of Holcombe and Lunsford to the effect that beginning at the point of derailment the flanges of the front wheels hit the same cross-tie in numbers of instances between the point of initial derailment and the point of final derailment. The front wheels on both sides could not have hit the same tie without having dropped 6¾ inches, the height of the rail. The first mark of the flanges on the ties was on the first three ties after the derailment, then on the seventh tie, then on the eighth tie, then on the ninth tie, the tenth, the eleventh, then on six ties from twelve to eighteen on both sides, and so on all the distance (record p. 62, 63). Not only this, but the mark of the left flange inside the rail at one place was eighteen inches from the rail (record p. 63). This not only showed that the wheels had dropped the height of the rail but also that they had moved to one side eighteen inches. Either proposition would have set the brake because the frame was only five inches high, and even if the trigger had not been exactly in the middle of the frame (as it should have been, according to Master Mechanic Goff), to drop 6¾ inches would have applied it, and as the frame was only eighteen inches wide a movement out laterally or to one side of eighteen inches from the rail, supposing the rod to have been somewhere near the middle of the frame, would have easily applied the brake. The frame was 18 inches wide, 5 inches high, and the trigger projected through the center of the frame.

So far as the curvature of the track is concerned as affecting the application of the brake, we call attention to the diagram of the track (page 99 of record) which shows that from

the first point of derailment there was a straight stretch of approximately two-thirds of 1350 feet which left no excuse for the watchman to fail to operate if in good condition. On straight track there must be a sheer drop under the laws of gravity when the truck first falls and this truck fell the height of the rail which was 6¾ inches above the tie. No more perfect condition for applying this watchman can be conceived of than a straight track. There is no swaying motion of the engine as in case of a curve which Goff, the master mechanic, claimed might have some effect upon the trigger. After the first derailment there was approximately a straight stretch, then a curve of 6 degrees to the left, then several hundred feet further on another curve of 6 degrees and 10 minutes to the right, then there followed a practically straight stretch of 1400 feet before the final derailment.

The undisputed evidence of Goree, as herein quoted, showed that the train, if the brake had been applied, should have stopped in 600 feet. The only suggestion made as to the creation of conditions which might render doubtful the application of the little watchman were curves. Here we have for seven-tenths of a mile many degrees of curvature, as well as several hundred feet of straight track and in one place 1400 continuous feet of straight track. Straight track would cause a sheer drop of the frame of the front truck which would apply the trigger. The truck necessarily had to drop straight down in the first instance. The center pin on the engine extended 3 inches into the truck and if the truck dropped it had to make a sheer drop of at least 3 inches and then the chains attached to the front end of the truck allowing for a little play would prevent it going back any material distance. (See Goree, record pages 75, 76.)

The court left very fairly to the jury the question as to whether the conditions were present which should have made the watchman apply. The plaintiff proved those conditions with mathematical certainty. It was admitted by the defendant's master mechanic Goff that with those conditions ex-

isting the watchman must have applied. It is true, after testifying on his direct examination that the watchman would have applied under those given conditions, that on the cross examination the master mechanic was somewhat vague, indefinite and evasive in his answers, but the true construction of his testimony was for the jury.

Goff's depositions were taken by the plaintiff. He was the defendant's master mechanic and the record shows that his conclusions were all favorable to his employer but the facts he stated and indeed the photographs and drawings of the little watchman made its application here so simple that the jury would have been compelled to draw their own conclusion that it would have applied in this derailment if it had been in good condition.

It is a matter of common knowledge that any such appliance could be out of condition. The valve could have stuck, the air pressure might have been insufficient to apply the brakes, the trigger might have been broken, the frame which sat on the front trucks might have been bent or even broken, and many other things might have put it out of condition.

We refer to our brief on file in opposition to the writ of certiorari as showing by Goff that the watchman should have applied the brake under the conditions here proved. See pages 5, 6, 7, and 8 of that brief. Also Goff's evidence in record pages 77, 80, 81, 82, and 86. See drawings and photographs of watchman on pages 109, 110, 111, 112, 117 and 118 of record.

Goff testified on page 77 of the record:

> "Whatever the height of that rail is, when those trucks get off, that wheel would drop to the tie or the ballast, one or the other."

We call attention of the court to the photographs of the watchman in the record on pages 109, 110, 111 and 112.

The apparatus is very simple. It merely depends upon the fall of the truck carrying down the frame in which is placed a trigger connecting with the air line. It applies the air exactly like the engineer applies the air from the cab.

Goff testified on pages 80 and 81:

> "As to there being any way to keep it from operating if the framework comes in contact with the trigger, from the construction of the valve, it would appear that it would have to work. It would operate, of course, to set the brakes."

We say that the foregoing testimony of the defendant's master mechanic Goff fits the exact facts of the instant case. It does not profit us to consider his vague answers on cross examination to the effect that the matter was in an experimental stage and that sometimes the device would set the brakes even when the conditions were not present which called for it. So far from this being in the defendant's favor, it is against the defendant. The general trend of this vague testimony on the part of Goff, as see page 86 of the record, is:

> "I might say that we have had some delays to trains on account of this device setting, and that would then involve the necessity of increasing the size of the framework."

There does not seem to have been any complaint by the master mechanic on his cross examination that the brakes did not set in every instance where they should, but that often they would set when they should not. This is to err on the side of safety and does not benefit the defendant.

On p. 86 record Goff said appliance was not perfect; that it had to be adjusted to the curvature of the track; that there had been some delay to trains on account of "this device setting;" that "this involved necessity of increasing size of frame work."

It is thus manifest that the size of the frame is adjusted to meet the curves. One or more experiments on the most extreme curves would show the size of the frame required to avoid unnecessary settings, and curves only affect the lateral movement of the frame and trigger. The up and down—vertical — movement of the frame depends on the height of the rail. If the ballast and ties are level the frame is bound to drop the height of the rail. As herein stated, Goff admitted this.

THE DEFENDANT NEVER PRETENDED TO EXPLAIN WHY THIS WATCHMAN DID NOT FUNCTION; THE DEFENDANT HAD IT EXAMINED AFTER THE WRECK BUT NEITHER THE WITNESS MAKING THE EXAMINATION AND INDEED NO OTHER WITNESS MADE ANY EXPLANATION WHATEVER OF WHETHER IT WAS IN FUNCTIONING CONDITION; THE INFERENCE WAS OVERWHELMING THAT THE WATCHMAN WAS OUT OF CONDITION AND THAT THAT MUST HAVE BEEN THE REASON WHY THE DEFENDANT MADE NO EXPLANATION OF ITS CONDITION.

The superintendent Madden showed in his statement, beginning on page 93 and on page 94 thereof (see record) that he went immediately to the scene of this wreck, arriving the same afternoon, and made an inspection. He tells on pages 95 and 96 of examining the locomotive. He said there was an attachment on the engine known as Wright's little watchman. He did not say one word about the condition that that little watchman was found to be in on this engine. He was strangely silent on that subject. The master mechanic Goff came to the scene of this wreck the same day and took the watchman off and testified as follows on page 82:

> "I did not test this watchman after I took it off; I understand that Mr. Stewart, the superintendent of motive power, had it tested; I don't know it; I know they told me they did test it, that is all I know about that part

of it. When I got there, the truck, as I say, was all laying over there; the truck part of it was all disconnected from the watchman part of it, from the trigger part; naturally, it would be. The trigger part of it, and the air pipe to the train line, had been taken off; Mr. Stewart had it taken off. It had been taken off when I got there; he had it taken off for the purpose, I understood, of having it tested."

And yet we have not a word in this record from Stewart, the superintendent of motive power, or anyone else on behalf of the defendant as to what condition this watchman was in. Why talk vaguely about whether the watchman on other occasions had functioned when it should not have functioned, when the defendant's agent had the watchman for a test, undoubtedly made the test, and did not show the court whether it was in condition or out of condition? The conclusion therefore is irresistible that the watchman must have been out of condition.

IN HIS CHARGE TO THE JURY THE JUDGE FAIRLY SUBMITTED THE DEFENDANT'S LIABILITY UNDER BOTH THEORIES, THAT IS, UNDER THE FIRST COUNT TO THE EFFECT THAT THE TRACK AND ROAD-BED WERE OUT OF CONDITION, AND THEN UNDER THE THEORY SET UP IN THE SECOND COUNT THAT THE LOCOMOTIVE INSPECTION ACT HAD BEEN VIOLATED BY FAILURE TO KEEP THE WATCHMAN IN PROPER CONDITION.

The defendant in the trial did not undertake to dispute the proof of the conditions which should have made the little watchman function. The defendant's answer was that the little watchman was an experiment. No jury could have misunderstood the issue as made by this evidence which was that the facts existed which would have made the watchman function if it had been in proper condition.

The judge charged the jury on page 150,—

> " . . . and if the same (watchman) did fail to function and operate, and if its failure to so operate, because it was not maintained in good condition, was the proximate cause of the death of Mr. Cox, then the plaintiff could recover in this case."

Again on pages 150 and 151 the court charged,—

> " . . . and if you believe that had it been in proper condition and safe to operate in the service to which the same was put that it would have caused the valve to trip when the front trucks became derailed, and that had it functioned the train would have been stopped by applying the brakes before it finally became derailed, and if you believe that the failure of this watchman to properly operate was due to the fact that it was not in proper condition and safe to operate in the service to which it was put, and that if it had operated the train would have been stopped and the decedent's life would have been saved," etc., then the defendant would have been liable.

In other words, the jury understood fully that the defendant would not be liable unless this was a case in which the watchman should have operated, and that its liability depended upon whether its failure to operate was due to the fact that it was not in proper condition.

The railway could have made its argument to the jury that under the facts of this case the watchman would not have applied even if in good condition. That question was left open as a question of fact under the judge's charge. The judge put the right to recover under the second count upon the proposition that the failure of the watchman to operate was because it was not maintained in good condition.

DEFENDANT SET UP IN ITS ANSWER THAT WATCHMAN WAS AN EXPERIMENTAL DEVICE DESIGNED UNDER CERTAIN CONDITIONS TO APPLY THE BRAKE; THAT THE SAME WAS IN GOOD CONDITION BUT PROPER CONDITIONS DID NOT DEVELOP TO CAUSE TRIPPING THE VALVE; JUDGE CHARGED JURY ON DEFENDANT'S CONTENTION THAT IF WATCHMAN WAS ONLY AN EXPERIMENT AND WAS NOT INTENDED TO BE A PERMANENT PART OF THE LOCOMOTIVE SO AS TO AUTHORIZE EMPLOYEES TO RELY ON THE WORKING AND OPERATION OF IT THAT ITS FAILURE TO WORK OR PERFORM ITS FUNCTIONS COULD NOT BE CHARGED AGAINST DEFENDANT AS NEGLIGENCE AND IT WOULD NOT BE LIABLE FOR FAILURE ON PART OF DEVICE TO OPERATE PROPERLY; WE CONTEND THAT THIS CHARGE GAVE DEFENDANT THE BENEFIT OF EVERY QUESTION OF FACT IT HAD ANY RIGHT TO RELY ON AND THAT THE CHARGE WAS TOO FAVORABLE TO DEFENDANT RAILWAY.

The defendant raised the issue of fact as to whether the conditions developed which called for functioning on part of this watchman. The defendant's answer (record pages 20, 21) claims that the watchman was so designed that under certain conditions "the derailment of the front truck wheels would trip a valve and thereby apply the air on the brakes of the train. It says that the same was in good condition on said engine at the time, but apparently the proper conditions did not develop which would cause tripping of said valve and the application of said brake. It says that the same is merely an experimental device, which will not operate at all times when said truck wheels leave the track, but will operate only when conditions develop which will trip the same."

Here was a clear recognition that there are conditions which will trip the valve. These are physical conditions and

the same were abundantly proved as hereinbefore set forth. If there were any conditions other than those proved by the evidence of the plaintiff, the defendant should have proved such conditions. Only by the cross-examination of the witness Goff to which only vague answers giving no details as to conditions,—did the defendant make any effort to prove the conditions which existed as to the front trucks.

No decision of which we are aware has allowed a carrier to claim that a safety device placed on all of its passenger engines and on a majority of all of its engines and which has been used by the defendant from five to seven years should not be kept in good condition merely because it is an experiment. Whether an experiment or not an experiment, it is on the engine and is a part and appurtenance thereof and the engine is doing the work of the carrier hauling passengers, and employees know it is on the engine and have a right to rely on it.

Undoubtedly the watchman was a physical part of the engine. The air brake line extended into the engine and this watchman with the trigger which opened the valve was as much a part of the engine as that part of the air brake line which sat in the engineer's cab and which the engineer applied. It was the same thing in principle. It gave the engine a degree of safety which an engine which did not have that appliance did not possess. The degree of safety which an engine possesses depends upon the type of that particular engine, and the type of that particular engine depends upon what the particular railroad desires it to be. The law does not require it to have any particular type of engine, unless the Interstate Commerce Commission has investigated and condemned a particular part of an engine which the railway puts on it and substituted another, and as long as the railway is allowed unmolested to add any particular parts to an engine or to use any particular type of engine, that particular part and that particular type of engine must be in good condition and must function properly.

We say that none of the decisions have recognized the contention that when an engine is out on the road running and hauling passengers, that any part of that engine placed thereon by the defendant for use in actual transportation can be called an experiment. Experiments should be conducted otherwise.

Again we refer to the master mechanic Goff who testified on page 78 of the record that the watchman had been used by the defendant five, six or seven years; that on this particular division it was used on the majority of engines; that this particular engine was equipped with it; that the company had been putting this appliance on the engines gradually; that all the passenger engines on this division were equipped with this appliance; that the railroad at one time quit using them but then started to putting them on again and had been increasing them ever since. (See Goff's redirect examination, pages 86 and 87.)

Certainly a mere conclusion of a witness that an appliance was an experiment in the face of such specific testimony as this would have raised a jury question and would have required the jury to find that this appliance was no experiment but had become a regular operating part of this engine.

An experiment should not be used in the transaction of the company's regular business. An experiment would hardly be used five to seven years. An experiment would hardly be used on every engine every day for at least five years in passenger traffic which was carrying on defendant's business. But as the defendant had made this claim that this appliance was an experiment, the judge submitted that issue to the jury as a question of fact, and the intimation of the Georgia Court of Appeals was that this was certainly not error against the defendant, implying that it was error in favor of the defendant. The judge in his charge gave the jury the benefit of the defendant's answer setting up this experiment contention, in the following language:

"The defendant contends that the device known as Wright's Little Watchman is really in an experimental state, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and therefore it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as contended, was simply an experiment, and this limited or experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly."

Defendant does not except to the manner in which this contention of experiment was submitted by the judge to the jury, but only contends in the petition for certiorari (p. 12 record), "There was no justification for submitting this question of fact to the jury, since all the evidence showed without dispute that the device was experimental and was not a device in general use." We have shown herein that the word "experimental" was a mere conclusion by interested witnesses; that the facts showed it had passed the experimental stage; that it was a part of defendant's passenger engine equipment, and whether other carriers used it or not, that it was a part and appurtenance of all defendant's passenger engines, and was used in their regular service, and had been for several years.

SAFETY APPLIANCE ACT APPLIES TO EVERY PART AND APPURTENANCE OF LOCOMOTIVE, BOILER AND TENDER AND REQUIRES THE SAME TO BE IN PROPER CONDITION; DEFENDANT'S CONTENTION THAT LOCOMOTIVE INSPECTION ACT DOES NOT APPLY TO WATCHMAN ANSWERED; LOCOMOTIVE INSPECTION ACT DISCUSSED AND NOTHING IN THE ACT OR IN THE RULES OF THE INTERSTATE COMMERCE COMMISSION OR IN ANY DECISION OF ANY COURT APPLY THE REQUIREMENT THAT ALL PARTS AND APPURTENANCES OF LOCOMOTIVE, BOILER AND TENDER BE KEPT IN PROPER CONDITION TO ANYTHING LESS THAN ALL PARTS AND APPURTENANCES WHICH ARE ACTUALLY ON ANY LOCOMOTIVE OPERATED BY A CARRIER.

The original boiler inspection act applied only to the boiler and appurtenances. (See Act February 17, 1911, c. 103, sec. 2, 36 Stat. 913.)

The amendment of 1915 applied the act to the entire locomotive, its boiler, tender, and all parts and appurtenances thereof. (See c. 169, sec. 1, 38 Stat. 1192.)

The final amendment was the act of 1924, c. 355, 43 Stat. 659.

All are contained in U.S.C.A., Title 45, from section 22 through section 34, and we will discuss them as so contained in U.S.C.A., pages 78 to 88.

The essential part of the act is section 23 of U.S.C.A. which reads:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in

> the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The other sections provide for appointment of inspectors, for the details of inspection, and for the making of rules.

Without going into the details of construction, we will quote three cases from the Supreme Court of the United States which deal with the power of the Commission and the character of the duty to keep the entire locomotive in proper condition.

In B. & O. v. Groeger, 266 U. S. 521, the court said that the duty to keep the locomotive and all parts and appurtenances in proper condition and safe to operate "prescribes a sufficiently definite standard of duty;" that the carrier's duty as to safety is absolute and continuing; that the carrier is liable for failure to comply with his duty, whether it had notice, actual or constructive, that the part was unsafe or defective. The court in this case also laid down this rule:

> "It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition."

The court in this case held that the law did not require a fusible plug to be placed in the boiler head and that the trial judge committed error in practically so charging. To compare that case to the case at bar, we say that if the defendant had constructed the engine in the Groeger case with a fusible

plug actually in it that then the defendant under the direct terms of the act of Congress would have been required to keep the fusible plug in proper condition, whether the plug was required by a rule of the commission or not. It would have been actually a "part and appurtenance" of the engine.

In the case of Napier v. Atlantic etc. Co., 272 U. S. 605, the Georgia statute undertaking to regulate certain appliances on locomotives of interstate railways was held void, because the boiler inspection act as amended has so occupied the field of regulating locomotive equipment on interstate highways that state legislation requiring cab curtains and other things is precluded, and such matters are left to the regulatory power reposed by that act in the Interstate Commerce Commission. The court said that previously (quoting, among other cases, the case of B. & O. v. Groeger, supra) the question of whether the act gave the commission power to specify equipment for locomotives was left open, but the court decided:

> "We think that power was conferred. The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not in proper condition for operation."

Further on the court said, in response to the argument that the power of the Commission "has been exerted only in respect to minor changes or additions," as follows:

> "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the Act delegating the power."

Further, the court said:

> "From time to time since the passage of the original Act, the Commission has required that locomotives used

> in interstate commerce be equipped with various devices"

and in a footnote on page 609 quoted various things covered by rules of the Commission, such as steam gauge, safety valves, water glass and gauge cocks, shut-off and drain cocks, shields on water and lubricator glasses.

In United States v. B. & O. Co., 293 U. S. 454, the court held that the Commission could adopt a rule requiring carriers to substitute power for hand operated reversing gear if the latter is found to make the engine unsafe or to subject employees or others to unnecessary peril of life or limb. It also held, in response to the argument that only the carrier could initiate the rules and that the Commission could only modify them, that the Commission's power was not limited to modifying the rules filed by the carrier or disapproving them, but, to use the court's language on page 461:

> "But the responsibility for rules adequate to insure safety was imposed by Congress upon the Commission; and to discharge that duty, it was essential that the Commission, also, should possess the initiative in rule making. To this end, it was granted the power, not only of disapproving proposed rules, but also of requiring modifications of those in force."

The court had previously quoted section 5 of the original act to the effect that each carrier should file its rules and instructions for inspection with the chief inspector, and that after hearing and approval by the Commission, such rules, with such modifications as the Commission requires, should become obligatory on the carrier.

RULES OF COMMISSION QUOTED AND DISCUSSED AND THE COMMISSION IN PROVIDING FOR SPECIFIC DEVICES OR OTHER CONSTRUCTION CHARACTERIZES ITS RULES AS ONLY THE MINIMUM REQUIREMENTS UNDER THE ACT; THESE RULES ENCOURAGE THE CARRIER TO ENFORCE ADDITIONAL RULES NOT INCONSISTENT WITH THE COMMISSION'S RULES TENDING TO A GREATER DEGREE OF PRECAUTION AGAINST ACCIDENTS; THESE RULES PROVIDE FOR MANY AUTOMATIC DEVICES ON RAILWAYS WHICH FUNCTION ONLY WHEN SOME PARTICULAR CONDITION ARISES; THESE RULES HOLD THE CARRIER RESPONSIBLE FOR THE GENERAL CONSTRUCTION AND MAINTENANCE OF THE LOCOMOTIVE AND HOLD THE RAILWAY'S MECHANICAL OFFICER RESPONSIBLE FOR INSPECTION AND REPAIR "OF ALL PARTS OF LOCOMOTIVES AND TENDERS UNDER HIS JURISDICTION;" THESE RULES REQUIRE THAT EACH LOCOMOTIVE SHALL BE INSPECTED BY THE CARRIER'S AGENTS AFTER EACH TRIP OR DAY'S WORK; THE ACT ITSELF REQUIRES DISTRICT INSPECTORS TO MAKE PERSONAL INSPECTIONS FROM TIME TO TIME TO CARRY OUT THE PROVISIONS OF THE STATUTE AND VARIOUS OTHER PROVISIONS ARE REFERRED TO SHOWING THAT EVEN THOUGH THIS PARTICULAR DEVICE, THE WATCHMAN, HAD NOT BEEN REQUIRED OR REFERRED TO BY NAME THAT THE GENERAL RULES AS TO KEEPING IN REPAIR AND INSPECTING PROMULGATED BY THE COMMISSION COVERED IT AS WELL AS EVERY OTHER PART OF THE LOCOMOTIVE.

Rules of the Commission, of which this court will take judicial cognizance (See Caha v. United States, 152 U. S. 211; Casarello v. United States, 271 Fed. 486; and also Napier

v. A. C. L., 272 U. S. on page 609 quoting various rules of the Commission), printed by United States Government Printing Office in 1931, contain rules and instructions for inspection and construction in many particulars, most of which are unnecessary here to discuss. On page 46, as to rules for inspecting and testing boilers and appurtenances, the following language is used:

> "The railroad company will be held responsible for the general design and construction of the locomotive boilers under its control."

Under the head of Rules for Testing Locomotives and Tenders, rules 101, 102, and 103 on page 60 provide as follows:

> "101. The railroad company will be held responsible for the general design, construction, and maintenance of locomotives and tenders under its control.
>
> "102. The mechanical officer in charge, at each point where repairs are made, will be held responsible for the inspection and repair of all parts of locomotives and tenders under his jurisdiction. He must know that inspections are made as required and that the defects are properly repaired before the locomotive is returned to service.
>
> "103. The term 'inspector' as used in these rules and instructions means, unless otherwise specified, the railroad company's inspector."

The order of the Commission found on page 17 of the rules, after reciting the power of the Commission and the fact that the carriers had filed their rules and the fact that the rules prepared by the chief inspector had been submitted to the Commission, concluded with this language:

> "It is ordered, That said rules and instructions for the inspection and testing of locomotive boilers and their appurtenances, as follows, be, and the same are hereby, approved, and from and after the 1st day of July, 1911,

shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: Provided, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents."

The foregoing order was dated June 2, 1911, after the passage of the act requiring inspection of boilers and their parts only. After the act of 1915 extending the boiler inspection act to the locomotive tender and all parts and appurtenances, the Commission passed an order on October 11, 1915, reciting the submission of rules and instructions to the Commission and concluding on pages 24 and 25 as follows:

"It is ordered, That the said rules and instructions for the inspection of locomotives and tenders and all their parts, as follows, be, and the same are hereby, approved, and from and after the 1st day of January, 1916, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: Provided, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents."

The rules promulgated by the Commission recognize and require many automatic devices which work under certain conditions, such as the steam gauge, on page 53, which correctly indicates the working pressure of the steam; the safety valve covered by rule 34, on page 53, providing that every boiler shall have two safety valves the capacity of which shall prevent, under any conditions of service, an accumulation of pressure more than 5% above the allowed steam pressure; and rule 35, which provides that safety valves shall be set to pop off at pressure not exceeding six pounds above the

working steam pressure; and rule 37, on page 54, which requires boilers to be equipped with water glasses and gauge cocks showing the condition of the water; and rule 41, on page 55, which requires all water glasses and lubricator glasses to be equipped with a safe shield which will prevent the glass from flying in case of breakage. We call attention to only a few of the safety devices referred to.

Beginning on page 60, many parts of the locomotive, including the brake system, are dealt with, and on page 61 it is provided as follows:

> "It must be known before each trip that the brakes on locomotive and tender are in safe and suitable condition for service; that the air compressor or compressors are in condition to provide an ample supply of air for the service in which the locomotive is put; that the devices for regulating all pressures are properly performing their functions; that the brake valves work properly in all positions; and that the water has been drained from the air-brake system."

It will be noted that the above rule generally requires that the air compressors are in condition to provide an ample supply of air for the service to which the locomotive is put; that the devices for regulating pressures are properly functioning; that the brake valves work *in all positions*. This very language would cover the valve in the little watchman in this case, as it was one of the valves used to apply the brakes. This requirement of air pressure would apply to the pressure in that part of the air line connected with the little watchman without any further specification, as this language applies practically to everything pertaining to brakes on the locomotive.

We call attention to rule 101 which provides that the railway is responsible for the general construction and maintenance of the locomotive and that the railway's mechanical officer will be held responsible for the inspection and repair "of all parts of locomotives and tenders under his jurisdic-

tion." This is not confined merely to the parts as to which the Commission has made specific orders. It covers all the parts, just as rule 101 covered all construction on the locomotive.

So we see that by general language the Commission has assumed its jurisdiction of inspection over every part of the locomotive, whether specifically named or not.

The Commission's rules as to specific parts are only the minimum requirements. The act of Congress requiring all parts and appurtenances to be in proper condition are the maximum requirements.

NOTHING IN LOCOMOTIVE ACT LIMITS REQUIREMENT OF "PROPER" PARTS TO LESS THAN ALL PARTS OF LOCOMOTIVE; NO DECIDED CASE LIMITS REQUIREMENT OF KEEPING PARTS "IN PROPER CONDITION" TO THOSE COMMISSION HAS REQUIRED TO BE PUT ON ENGINE.

Many cases have dealt with the words used in Section 23 in requiring that as to the locomotive and tender and all parts and appurtenances thereof the same must be "in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb."

We quote in this brief a great many cases which show that no court has ever sustained the contention that the commission must act in reference to some particular part or appurtenance before the condition of safety generally required must be maintained. We find only two cases in which a somewhat similar contention seems to have been made as to safety appliances on cars, and one is Illinois, etc., Rwy. v. Williams, 242 U. S. 462, and the other is the case quoted by the defendant in 37 Ga. App. 570, both of which deny this contention as we show herein later in this brief.

There is nothing in either section 23 or in the rules adopted by the commission that limits inspection to those parts or appurtenances required and specified by dimensions and other descriptions in the rules of the commission. On the contrary, the inspection required by the commission is made largely by the employees of the carrier, and, as section 102, on page 60, provides, the mechanical officer in charge, who is the company's inspector, will be held responsible for the inspection and repair of all parts of locomotives and tenders under his jurisdiction.

Section 29, on page 85, of 45 U. S. C. A., requires each government district inspector to make such personal inspection of the locomotive boilers under his care from time to time as may be necessary to carry out the provisions of this statute, but he is not required to make such inspections at stated times or at regular intervals. It is further provided by this section that each carrier shall file with the inspector in charge, under the oath of the proper officer of the company, a duplicate of the report of each inspection required by the rules and regulations and also showing the repair of defects disclosed by inspection.

Rule 104, on page 60, provides: "Each locomotive and tender shall be inspected after each trip, or day's work, and the defects found reported on an approved form to the proper representative of the company." Then follow details as to what this report shall show and the report is required to be filed in the office of the railroad company at the place where the inspection is made.

We thus see that Rule 101 having provided that the railroad company is held responsible for the design, construction and maintenance of the locomotive, and Rule 102 having required that the carrier's officer in charge is held responsible for the inspection and repair "of all parts of locomotives and tenders under his jurisdiction," and Rule 104, providing for an inspection of each locomotive after each trip or day's work,—the scope and character of these requirements would

cover every defect found in any part of the locomotive and is not by any means restricted to those parts which may have been mentioned by name in some rule or specification of the commission.

A particular part of the locomotive can be as well described in a general way as in a specific way, and the commission was assuming full jurisdiction of every part of the locomotive for the purpose of inspection and repair by these wide and sweeping rules; but even if it had not in this way taken full jurisdiction of all parts of the locomotive it had the power to do so, and having the power to do so, whatever is placed on the locomotive by the carrier is necessarily with the permission or implied sanction of the commission and is thus covered by the scope of the act.

But as argued in this brief, even if the commission had taken no jurisdiction of these parts, and even if it had not had power to cover all the parts of the locomotive, it should be held, in such a situation, that there are two separate and independent parts to this enactment, one covering all parts of the locomotive and tender for purposes of keeping in proper condition and the other covering such parts of the locomotive as the commission takes jurisdiction of for purposes of regulating, inspecting and testing.

ALL DEFENDANT'S CONTENTIONS IN ITS PETITION FOR CERTIORARI ARE TAKEN UP ONE BY ONE AND ANSWERED.

FIRST CONTENTION IS THAT WATCHMAN IS UNRELIABLE AND WILL ONLY OPERATE UNDER CERTAIN FAVORABLE CONDITIONS; WE SAY THE PROOF SHOWS THESE CONDITIONS EXISTED AND REFER TO THE PORTIONS OF THE EVIDENCE WHICH SO SHOW.

The essence of the carrier's contention begins on page 13 of the petition for certiorari.

The first ground on page 13 is that the undisputed evidence shows that the watchman will only operate when conditions develop that will bring the bracket in contact with the trigger, that actual experience has shown that sometimes it will operate and sometimes it will not, that occasionally it will stop a train when the trucks are not derailed. It is not specifically claimed that the conditions did not develop which should have caused it to operate.

In addition to our previous discussion on this subject we say: It was a question of fact for the jury as to what this appliance would have done, if in proper condition, under the facts of this case. The operation of it depended upon the simplest principles. The fact that it was an automatic device cuts no figure as many things about locomotives and all other machinery are as automatic as this appliance.

Goff was the defendant's master mechanic and was brought before a commissioner by the plaintiff. He was an interested witness in every way for the railway company. We have quoted his evidence in our brief to show that under the facts of this case the appliance must have worked. The jury would know that fact without the evidence of any witness. Detailed drawings of this appliance were in evidence showing how it worked. Full photographs of the appliance were in proof which showed that it worked by tripping a trigger upon a mere fall of the front trucks.

The facts of this case were gone into in great detail showing the height of the rail, the numerous places where both the right and left front wheels struck the same rail and showing the distance the truck must have fallen. The circumstantial evidence indeed showed that that trigger would have been pulled down from 3 to 5 inches by the downward motion of the trucks and moved 9 inches by the lateral or side motion of the trucks.

Certainly this evidence was abundantly sufficient to justify the jury in finding that if the valve had not stuck or the pipe

line clogged up in some way, or the air-pressure been weak or the trigger broken or bent, or something out of condition about the apparatus, it must have worked.

Goff, the master mechanic, testified that Stewart, the superintendent of motive power of the railway company, took the apparatus away with him after the wreck and had it tested. Yet none of the results of that test were made known to the court. Stewart was not a witness and it was not in any way explained that the test showed the apparatus to have been in functioning condition.

Stress is laid upon the fact in opposing counsel's brief that a little negro boy testified that he put a rock on the track to see it mashed and that in a few feet after passing over it the front wheels of the locomotive left the track. It was for the jury to say whether this child was telling the truth. Even if this rock had been placed on the track by this child, and even if it caused the derailment (which is improbable, as see our discussion of that subject in the brief), it was this very condition of the front trucks being derailed that the little watchman was designed to render harmless. This device would operate only in case of the derailment of the front trucks. We have the most unusual case of the engine running seven-tenths of a mile with the front trucks off bumping on the cross-ties, and within that seven-tenths of a mile subjecting the watchman to every conceivable test, both on curves, on straight track and over crossings, as the court will see from the diagram and photographs of the track along this seven-tenths of a mile. Surely a jury could have found as a question of fact that with all this dropping 6¾ inches to the rail, with all this turning to the side of 18 inches, with all this proceeding both on curves and on straight track, that somewhere in that course, if the watchman had been in condition, it would have functioned. This was not a short fragmentary test of a moment, but it was a long, exhaustive test of this watchman, subjecting it perhaps to every conceivable condition which all kinds of track could have subjected it to.

Opposing counsel argue that the adjustment of such a device is not an exact science, and that one adjustment will not suit all conditions of track, curve and speed, that if it is set to be too sensitive, any slight unevenness of the track might set it, that if it is set too far from the trigger, even a derailment of the front trucks might not move it. But here there was a very exhaustive and far-reaching test. It was a question for the jury whether the circumstances of this test were not sufficient to have caused it to operate if it had been in proper condition.

While some skill is required as to setting the trigger and determining the size of the frame and the length of the trigger so as to cause the air to apply with this little watchman, yet there must necessarily exist conditions under which it would always apply, and this is a question of fact and the judge submitted that question of fact to the jury.

GROUND 2, p. 13, OF DEFENDANT'S PETITION IS THAT NO SUCH DEVICE IS REQUIRED OR EVEN MENTIONED IN THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, OR OTHER ACTS OR THE RULES OF THE COMMISSION AND IT IS STATED THAT THIS COURT WILL DOUBTLESS TAKE JUDICIAL COGNIZANCE OF THESE RULES AND REGULATIONS; WE SAY IT IS COVERED BY THE GENERAL WORDS "ALL PARTS AND APPURTENANCES" AND NEEDS NO FURTHER DESCRIPTION.

We say the words in the act as to safety and peril, etc., mean that as a conclusion from having the boiler and all its appurtenances in proper condition, that the boiler is therefore safe to operate and may be employed in the carrier's service without unnecessary peril, etc. These conclusions may be really called a statement of the purposes for which the act was passed.

Thus there are two distinct requirements in this act as

finally codified in Section 23 of U. S. C. A., Title 45, the first being the requirement that the entire locomotive and parts and appurtenances shall be in proper condition. The language that it is safe to operate in the service and that it may be employed without unnecessary peril, as we have stated, is a conclusion and is the same as saying, "Having required the locomotive and tender and every part and appurtenance thereof to be in proper condition, we conclude that this will make the locomotive and tender safe to operate in the service and that it may be employed without unnecessary peril to life or limb."

The next distinct proposition dealt with is to give the commission full power of making rules for inspections and of making rules for tests. This is part of the machinery adopted by the act to see that all parts of the engine are in proper condition and safe to operate.

There is nothing in the law which says how much of its power to inspect and make rules for the safety of locomotives must be exercised by the independent authority of the commission. The subject of rules is put in motion by the railway taking the initiative and submitting to the commission such rules as it proposes.

Of course, the language in the Napier case, 272 U. S. 605, must be taken to mean that the commission sets the standard for locomotives insofar as it makes requirements and rules. As to subjects which it makes no rules or requirements about, that is left to the carrier, but is still regulated by that portion of the act which says that every part and appurtenance of the locomotive must be in proper condition. In other words, as the commission itself says in its rules, the rules and requirements made by the commission are the minimum requirements. As to the other parts of the locomotive, they are governed by the maximum requirement of the enactment which says that all parts and appurtenances must be in proper condition.

In the Napier case, on page 612, the court said:

> "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred has no bearing upon the construction of the Act delegating the power."

Thus we see a clear recognition that the commission may not have exercised its full power, but that it possesses power to order every detail of a locomotive. Until that power is exercised and as long as there is any device which functions as a part of the locomotive, it is covered by the language of the act itself, which, without going into detail, made a comprehensive description of all parts and appurtenances of the locomotive. This is a maximum requirement on carriers as to keeping all parts of the locomotive in proper condition.

CASES ON SAFETY APPLIANCE LAWS DISCUSSED; ALL APPLY GENERAL REQUIREMENT OF ACT AS TO PROPER OR SAFE CONDITIONS OF PARTS AND APPURTENANCES ON LOCOMOTIVE OR CAR; ALL HOLD THAT IF APPLIANCE FAILS TO FUNCTION UNDER PROPER CONDITIONS IT IS DEFECTIVE; REQUIREMENT OF PROPER CONDITION INDEPENDENT OF ACTION BY COMMISSION.

In the case of B. & O. R. R. v. Groeger, 266 U. S. 521, before quoted, the court recognized to the fullest extent that section 2 of the Boiler Inspection Act, in requiring the boiler and appurtenances (and that was an explosion case) to be in proper condition and safe to operate, etc., prescribes a sufficiently definite standard of duty; that under this section the carrier's duty to have the boiler in safe condition is absolute and continuing.

This case is a clear recognition that the engine as a whole must be in proper condition and that every part and appurtenance thereof must be in proper condition. If there had been a fusible plug on the boiler of the engine in the Groeger

case, it would have had to be in proper condition, and if it had not been and the conditions were such as to make it function had it been in proper condition and that was the proximate cause of the explosion, we contend the defendant would have been liable.

It has been repeatedly held that if the conditions are present which should make a device function under ordinary circumstances and it does not function, this brings the case under the Safety Appliance Act. The general doctrine of res ipsa loquitur in ordinary negligence cases is very different from the doctrine under the Safety Appliance Act. A much greater burden is on the employee under the common law rules of liability where he not only has to prove defective condition of appliances but the negligence of the employer. An employee may be injured by a defective instrumentality but the employer may not be negligent in respect to it. The employer may have made proper inspection and have been diligent and yet not discovered it. The defect may have been latent. But under the Safety Appliance Act, all that is required to be shown to make the employer liable is a defective condition. The law absolutely requires the appliance to be in proper condition, and this without reference to negligence.

Here there was, first, proof of the failure to function in that the brake was not applied; second, all the conditions were shown to be present which would have required the appliance to function if in proper condition; third, the judge required the jury to find that the appliance was not in proper condition before the jury could find for the plantiff; fourth, the judge required that the defective condition be the proximate cause of the injury; and, fifth, the judge put the burden of showing by a preponderance of the evidence his case on each count, on the plantiff. Record pages 144-150.

The case of McDonald v. Great Northern Rwy., 207 N. W. 194, same case 166 Minn. 87, holds generally that evidence that a train ran a mile after the air brakes were applied was evidence of a defect in the brakes.

That the duty under the Safety Appliance Act is absolute has been repeatedly held by the Supreme Court. See St. Louis, etc., Rwy. v. Taylor, 210 U. S., page 281, in which case the court, in the body of the opinion, said:

> "The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

In Minneapolis, etc., R. R. v. Gotschall, 244 U. S. 66, it was held that under the federal statutes requiring safe appliances to be furnished, the opening of an automatic coupler while the train was in motion, causing the death of a brakeman, authorized the jury to find the defendant liable. While the court used the words that the jury was authorized to infer negligence, it is clear that this was meant only in the sense of a defective construction, the court using this language:

> "The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It is insisted this was error, since, as there was no other evidence of negligence on the part of the company, the instruction of the court was erroneous as, from whatever point of view looked at, it was but an application of the principle designated as res ipsa loquitur, a doctrine the unsoundness of which plainly results from the decisions in Patton v. Texas & P. R. Co., 179 U. S. 658, and Looney v. Metropolitan R. Co., 200 U. S. 480. We think the contention is without merit, because, conceding in the fullest measure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circum-

stances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars."

This is a clear recognition that if the appliance fails to function it is sufficient proof that the defendant has violated its positive duty to furnish a safe appliance.

In the case of Philadelphia, etc., Co. v. McKibbin, 259 Fed. 476 (Court of Appeals, Third Circuit), which was a case under the Safety Appliance Law, where a brakeman undertook to open a coupler with a lever and the same failed to open, this failure to function was held sufficient evidence of a defective condition to carry the case to the jury.

In the case of San Antonio, etc., Ry. Co. v. Wagner, 241 U. S., page 476, this court held that evidence that a coupling pin failed to drop when the cars came together is sufficient to sustain a finding that one or both couplers did not measure up to the requirement of the Safety Appliance Act requiring couplers coupling automatically by impact. The court, in concluding the opinion in this Wagner case, held that the liability grew out of a defective condition in the coupling apparatus and not out of negligence in respect thereto.

In the case of Texas, etc., Rwy. Co. v. Rigsby, 241 U. S., page 33, a switchman was injured through a defect in a hand hold forming one of the rungs of a ladder which he was descending. The court in holding that the defective condition was sufficient to show liability stated:

> "The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition."

In Pennsylvania R. Co. v. Jones, 300 Fed. 525, the Court of Appeals for the Sixth Circuit held that in an action under

the Safety Appliance Act for injuries to a brakeman attempting to uncouple cars, evidence that a lifting pin did not work on the first effort may be sufficient evidence of an existing defect, if it also appears that the effort was of a character and made at a time when it would have naturally been effective, save for a defect. The court in this opinion says:

> "Hence a failure of the pin to lift may indicate that the device is defective, or may indicate that the effort was made at the wrong time. We are convinced that evidence that the lifting pin did not work upon the first effort may be sufficient evidence of an existing defect, if it also appears that the effort was of a character and made at a time when it would have naturally been effective, save for a defect," etc.

In Didinger v. Pennsylvania R. Co., 39 Fed. (2) 798, the Court of Appeals of the Sixth Circuit ruled as stated in the third headnote,—"Efficiency of hand brake equipment is challenged or inefficiency established by establishing particular defect or showing failure to function when operated with due care in normal manner."

In Phila. etc., v. Auchenbach, 16 Fed. (2) 550, the Court of Appeals of the Third Circuit, in the case where a coupler was injured where the cars failed to couple by impact, as the statute required, referring to the duty to equip the cars with such appliances, said, "That duty is absolute and unqualified and contemplates the maintenance of such appliances in working condition 'at all times.' (Citing authorities.) The test of the observance of this duty is the performance of the appliances."

In the case of Phila., etc., v. Eisenhart, 280 Fed. 271, the ruling as expressed in the second headnote was as follows:

> "In action for injuries to freight conductor, sustained when cars parted on opening of couplers, the mere opening of the couplers held to warrant submission of whether

the couplers were defective, in violation of Safety Appliance Act, March 2, 1893."

In Spencer v. Seaboard Air Line, 201 N. C. 537, s. c. 160 S. E. 763, the court in the third headnote as contained in 160 S. E. 763 made the following ruling:

> "Inefficiency of hand brakes on freight car causing injury to brakeman may be shown from some particular defect, or by a failure to function when properly operated."

We have referred in our brief in opposition to granting writ of certiorari to Hines v. Smith, 275 Fed. 766 (Court of Appeals Seventh Circuit), in which an automatic bell ringer was held to be a part and an appurtenance of a locomotive and tender within the meaning of the Boiler Inspection Act, as amended, providing that railroads must equip locomotives and tenders with proper appurtenances, and in which the court used the following language:

> "It is claimed on behalf of plaintiff, and evidence supports the contention, that the automatic bell ringer was out of order and would not ring on the night of the accident, and that it had been out of order for some time. In answer thereto, defendant asserts that this act does not apply to bell ringers, and that the declaration does not charge a violation thereof. With neither position can we agree. The amendment of 1915, we think, leaves no room for doubt. Certainly a bell ringer is a 'part' or an 'appurtenance' of a 'locomotive and tender.' While a liberal construction of this statute is not necessary to justify this conclusion, it is evident that the amendment should be liberally construed and its obvious purpose effectuated."

In the case of Hines v. Smith, an employee was injured in crossing the track in front of the engine on which the automatic bell failed to ring. His claim was that the fireman was

not on the engine; that the engineer could not ring the automatic bell because it was out of condition, and that because of failure to signal him he was not warned and went upon the track and was injured. It does not appear that the Interstate Commerce Commission in its rules has ever taken cognizance of the automatic bell ringer. At least we can find nothing about it in the index to its rules. The carrier claimed that the bell ringer was not a part or appurtenance of the locomotive within the sense of the act, but the Circuit Court of Appeals for the Seventh Circuit held that it was and that its failure to function rendered the carrier liable.

In Great Northern, etc., Co. v. Donaldson, 246 U. S. 121, a locomotive engineer was killed by a boiler explosion and it was contended that the engine was not in proper condition because of the use of crown bolts having large button heads and it was contended by the defendant that the Federal boiler inspectors did not disapprove these buttons when they inspected the engine but the Supreme Court used the following language:

> "Nor can we agree with the contention of the plaintiff in error that, so long as the large button head had not been disapproved by the government inspector, such fact is conclusive of the sufficiency of the type in use. We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the Federal boiler inspector."

The effect of this decision is to give effect to that provision of the Boiler Inspection Act which makes the direct requirement that all parts and appurtenances must be in proper condition.

The case of Lehigh Valley R. Co. v. Beltz, 10 Fed (2) 74 (in which a certiorari was denied by the Supreme Court of

the United States in 270 U. S. 641), deals with the Locomotive Appliance Act in the case where the main pin of the locomotive broke causing the driving rods to fly about, punching a hole in the boiler and causing an emission of steam, hot water and fire into the cab and causing the death of the plaintiff, an employee, and it was held that the carrier was liable, and as headnote 4 states:

> "Boiler Inspection Act of Feb. 17, 1911, section 2, as amended by Act of March 4, 1915, imposes on carrier in interstate commerce an absolute duty to keep its locomotives free from defects and absolutely safe to operate; 'absolute duty' meaning one not subject to any limitation or condition, positive and not dependent, and unqualified by any considerations whatsoever."

In the case of Swinson v. Chicago, etc., Co., 294 U. S. 529 (Pamphlet No. 3, 529), this court held that the Safety Appliance Act is liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with the act's requirements, and in that case it was held that where a brakeman was using a grab iron as a foot brace to enable him to release a hand brake and where there was evidence that the use to which it was put by the plaintiff was customary and where the grab iron gave way and was insecure, that the plaintiff could still recover, and the court even cited the case where a traveler on a highway could recover for failure to maintain proper brakes.

GROUND 3 ON PAGE 14 OF THE PETITION FOR CERTIORARI QUOTING 45 U. S. C. A. SECTION 23 CLAIMS THAT THE ACT APPLIES ONLY WHERE THE USE OF A PART OR APPURTENANCE WOULD CAUSE UNNECESSARY PERIL TO LIFE OR LIMB UNLESS IT WAS IN PROPER CONDITION AND SAFE TO OPERATE; ANSWERED.

The simple answer to this proposition is that for this appurtenance to be out of condition would cause unnecessary

peril in the event of the very disaster it was designed to prevent, that is, the derailment of the front trucks. The device being on the engine and its operation preventing a derailment by stopping the train almost instantly, it would thus, by being in proper condition, prevent unnecessary peril to life or limb. By being in improper condition and failing to function it would cause unnecessary peril to life or limb by allowing the train to be derailed. This peril is unnecessary because if the device functioned the peril would not exist.

THE NEXT GROUND IN PARAGRAPH 3, ON P. 14, PETITION FOR CERTIORARI, IS THAT SECTION 23 DOES NOT APPLY TO A DEVICE WHICH COULD NOT POSSIBLY ENDANGER THE LOCOMOTIVE BUT MIGHT POSSIBLY ADD TO THE SAFETY OF THE TRAIN IF THE PROPER CONDITIONS DEVELOPED CAUSING IT TO OPERATE; IF THIS CONTENTION WERE SOUND EVERY SAFETY DEVICE ON THE LOCOMOTIVE WOULD BE EXCLUDED FROM THE STATUTE'S REQUIREMENT OF BEING IN "PROPER CONDITION."

If this line of reasoning were adopted, every safety apparatus on the locomotive would be excluded as a part and appurtenance of it. Of course, no safety device endangers the train. Its object is to prevent disaster when some condition develops which the device could render harmless. Take as an illustration the steam safety valve which, when the pressure gets to a certain point, pops off and releases the steam. This is a safety device to prevent an explosion from excessive pressure. It could just as well be argued that the pop off valve did not endanger the train but might possibly add to the safety of it if the conditions develop which would cause it to operate and that therefore the statute did not cover it. The language of the act requires a more liberal construction. The law surely does not mean in dealing with a standard of safety and seeking to prevent unnecessary peril to life or limb to dispense with the appliances which are actually on the loco-

motive. On the contrary, it must take all the appliances of every locomotive as the standard of safety for that locomotive and must require them to be in proper condition. It is this failure to be in proper condition as to appliances actually on the locomotive which will cause unnecessary peril to life or limb.

THE NEXT CONTENTION UNDER PARAGRAPH 3, ON P. 14, OF PETITION FOR CERTIORARI IS THAT SECTION 23 APPLIES ONLY TO SUCH PARTS AS ARE REQUIRED TO BE INSPECTED IN ACCORDANCE WITH RULES ADOPTED BY THE COMMISSION UNDER THE PROVISION OF THE BOILER INSPECTION ACT AND TO MEET THE TESTS PRESCRIBED IN THE RULES AND REGULATIONS AND DOES NOT APPLY TO A DEVICE NOT REQUIRED TO BE INSPECTED OR TESTED; THIS CONTENTION FULLY ANSWERED AND THE PROVISIONS OF THE ACT, INDEPENDENTLY OF ANY ACTION OF THE COMMISSION, REQUIRE EVERY PART AND APPURTENANCE OF LOCOMOTIVE TO BE IN PROPER CONDITION.

This reasoning is not borne out by the language of the act. It does not say that only those parts must be in proper condition which are inspected or tested. The first portion of the enactment applies to the entire locomotive "and all parts and appurtenances thereof" and requires them to be in proper condition and safe to operate in the service that the same may be employed without unnecessary peril to life or limb. This portion of the act expressly applies to all parts and appurtenances without exception.

Further on the act adds an additional condition to using the locomotive in these words,—"and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected and are able to withstand such test or tests as may be prescribed in the rules and regulations provided for."

This latter language is dealing with a different subject and in a different way, but undoubtedly puts under the jurisdiction of the commission for inspection and testing every part of the locomotive. The commission may not exercise that power of inspection and testing as to all the devices and may inspect, test and require only a few, but all the parts and appurtenances on an engine are subject to their power of inspection and testing and are covered by that part of the act which requires all parts and appurtenances to be in proper condition. Being in proper condition is in no way dependent upon being tested and inspected by the commission and it has never been so held by any court.

The act itself takes in all the parts and appurtenances. If the commission has failed to make rules for inspecting every part and appurtenance, it may have failed in exercising its full power or even duty, but nevertheless the act still requires all parts and appurtenances on that locomotive to be in proper condition. Certainly if a fair construction of the act covers every part and appurtenance on the locomotive, both as to being in proper condition and as to being inspected by the commission, a mere failure by the commission either to inspect or make a rule for inspecting certain parts cannot narrow the scope of the act as to the parts required to be in proper condition.

It can well be said that the commission itself has met this situation by providing in an order that its rules and instructions "for the inspection and testing of locomotive boilers and their appurtenances as follows, be and the same are hereby approved and from and after the 1st day of July, 1911, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements; provided that nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents." Pages 17 and also 25 printed rules, 1931.

To illustrate,—here is a locomotive with ten safety devices on it. The commission makes rules requiring five of those devices to be installed and inspected. It had the power to make rules which provided for the installation and inspection of every part of any locomotive. Those parts as to which rules were not made even for inspecting are still under that jurisdiction. They are allowed, however, to be on the locomotive without any positive requirement. The devices referred to in the rules constitute the minimum absolute requirement but inasmuch as the act requires all parts and appurtenances to be in proper condition, this constitutes a maximum requirement covering the devices not named in the commission's rules if they are parts and appurtenances of the engine.

Furthermore, the words "all parts and appurtenances" in the latter part (line 6) of section 23 following the words "and unless" do not have precisely the meaning which these words have in the first part of the act but are adaptable and only apply to all parts and appurtenances which are required by the rules to be inspected and have reference only to the requirement of inspection and testing. In other words, the words "and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for," apply only to all parts and appurtenances required by the rules to be inspected and tested. If the commission makes requirements as to every part of a locomotive, the second proposition in the act would cover all parts covered by the first part as to "proper condition." We say the commission's rules do require every part to be inspected. But it may not have exercised this full power. The commission may think that only certain parts and appurtenances need be inspected and tested. Therefore, this language applies in the latter part of this section to "all parts and appurtenances" required to be inspected and tested or required by the commission to be on the engine. The language in the last six lines of this section is dealing

with parts and appurtenances for different purposes from the language in the first part of the section. There is nothing in the last six lines showing that only those parts and appurtenances inspected and tested on the locomotive should be in proper condition. The last six lines are only requiring that the engine must not be used unless all parts and appurtenances required to be inspected by the rules have been inspected and tested as the rules require. The word "all" is used only in this sense and in connection with the rules for inspecting and testing. No inspecting or testing is required for any parts except those so required to be by the rules. This is not dealing with the question of whether other parts and appurtenances not required to be tested or inspected should be in proper condition.

This act has two distinct propositions in view. One is that every part and appurtenance ("all parts and appurtenances thereof") which is actually on the locomotive must be in proper condition,—otherwise that locomotive is not "safe to operate" and is not permitted to be used. The other is a further provision that that locomotive must not be used unless all parts and appurtenances thereof which are required by the rules and regulations to be inspected and tested have actually been inspected and tested.

The first proposition covers "all parts and appurtenances" on the locomotive and requires them to be in proper condition before the locomotive can be used. It is a comprehensive, all-embracing proposition.

The second proposition is a further and additional limitation on the right to use the engine, beginning with the words "and unless said locomotive and all parts and appurtenances have been inspected in accordance with the rules and are able to withstand the test prescribed by the rules," meaning, of course, all those parts and appurtenances required to be tested and inspected and covering also (under the case of Atlantic, etc., Co. v. Napier, supra) the presence of all parts required by specific order of the commission. But even if inspected and

passed under the commission's rules and it turns out the parts are not in proper condition, the carrier would still be liable.

So that we say the requirement as to a proper condition applies to everything on the engine whether inspected or not. The failure to inspect and test all the parts covered by the rules is an additional reason why the locomotive cannot be used. We have shown elsewhere in this brief, however, that the commission's rules require inspection of all parts of the locomotive which would include the watchman.

PARAGRAPH 4 ON PAGE 14 OF PETITION FOR CERTIORARI CONTENDS THAT THE BOILER INSPECTION ACT MERELY REQUIRES A CONDITION WHICH WILL PERMIT USE OF THE LOCOMOTIVE WITHOUT UNNECESSARY PERIL TO LIFE OR LIMB; WE SAY WITH THE WATCHMAN ON THE ENGINE THE PERIL FROM DERAILMENT OF FRONT TRUCKS WAS AN UNNECESSARY PERIL; IT WAS ONLY A PERIL IF THE WATCHMAN FAILED TO FUNCTION.

We answer,—this unnecessary peril refers to a relative condition, and refers to the locomotive with all parts and appurtenances in proper condition and after all parts and appurtenances, which have been required to be inspected and tested, have been inspected and tested.

PARAGRAPH 5, ON PAGE 14, OF PETITION FOR CERTIORARI CONTENDS THAT UNLESS SPECIFIED IN THE ACT THE RULES AND REGULATIONS PRESCRIBED BY THE COMMISSION FIX THE STANDARD; BUT EVEN THESE, WHILE CONSTRUCTED AS REQUIRED BY THE RULES AND REGULATIONS, MUST STILL BE KEPT IN PROPER CONDITION AND THE RULES ONLY FIX THE STANDARD SO FAR AS THEY GO; DEVICES NOT COVERED BY THE RULES ARE STILL PARTS OF THE LOCOMOTIVE AND MUST BE IN PROPER CONDITION.

The act does specify sufficiently as to parts not specified by the commission's rules. It says "all parts and appurtenances" must be kept in proper condition. A description can be by general terms. It has been held that the words "proper condition" are sufficiently definite, as see B. & O. v. Groeger, 266 U. S. 521. The rules of the commission requiring certain things on the locomotive are absolute and must be complied with as a minimum standard but if there are any other parts and appurtenances on the locomotive they must also be in proper condition and this latter is the maximum requirement.

PARAGRAPH 6, ON PAGE 15, OF THE PETITION FOR CERTIORARI ARGUES THAT IF THE DEVICE (WATCHMAN) HAD NEVER BEEN APPLIED TO THIS LOCOMOTIVE THE LOCOMOTIVE WOULD HAVE FULLY COMPLIED WITH ALL REQUIREMENTS OF FEDERAL LAW AND YET THE ACCIDENT WOULD HAVE HAPPENED; THAT WITH THE DEVICE ACTUALLY APPLIED, BUT FAILING TO SET THE BRAKES, THE LOCOMOTIVE WAS IN EXACTLY THE SAME CONDITION IT WOULD HAVE BEEN IN IF THE DEVICE HAD NEVER BEEN PLACED ON IT AND WOULD HAVE AS FULLY COMPLIED WITH ALL FEDERAL SAFETY REQUIREMENTS; THAT LIABILITY HAS BEEN IMPOSED UPON PETITIONER MERELY BECAUSE IT VAINLY ATTEMPTED TO DO MORE THAN THE LAW REQUIRED; DEFENDANT LOSES SIGHT OF THE FACT THAT IT ADDED A PART TO THAT ENGINE WHICH MADE IT A SAFER ENGINE; PRESUMABLY EMPLOYEES AND EVEN PASSENGERS RELY FOR PROTECTION UPON ALL THE EQUIPMENT PLACED ON THE ENGINES; BY ADDING THIS SAFETY APPLIANCE TO THE ENGINE THE DEFENDANT INCREASED THE STANDARD OF SAFETY FOR THAT LOCOMOTIVE; CERTAINLY THE DEVICE BECAME A PART AND APPURTENANCE OF THAT LOCOMOTIVE.

The defendant was entitled to all the credit for having a safer engine than other railroads which did not have this part and appurtenance on the engine. As has been held, the railroad has the right to make its engine largely its individual affair. It can claim over its competitors that it has a better and safer engine, but in making it better and safer it has established a standard which this law applies to in requiring "all parts and appurtenances" to be in proper condition. It is conceivable that these appliances were inducements to employees to seek employment with the defendant and rely upon its superior equipment for safety. It does not lie in the defendant's mouth to say, "I made the engine safer than I was required to do under the rules of the commission." The answer is "The safety appliance act deals with your engine as you have constructed it. What you have made in the way of a locomotive and the parts and appurtenances you have put on it you must keep in proper condition. That is your standard of safety."

THE LOCOMOTIVE IS CONSIDERED BY THIS LOCOMOTIVE APPLIANCE STATUTE AS JUST AS SAFE AS ALL THE PARTS AND APPURTENANCES ON IT MAKE IT WHEN THEY FUNCTION PROPERLY, AND THAT DEGREE OF SAFETY IS IMPERILED WHEN THEY FAIL TO FUNCTION. IN THE GENERAL SENSE OF THIS STATUTE, THE ENGINE MUST BE SAFE TO OPERATE IN THE SERVICE TO WHICH IT IS PUT. IN OTHER WORDS, WITH THE APPURTENANCES PLACED BY THE CARRIER ON THE ENGINE, THE DEGREE OF SAFETY WHICH WOULD RESULT IF THOSE APPLIANCES FUNCTIONED PROPERLY MUST BE MAINTAINED.

It is true the train could run without the air brake with a certain degree of safety, but that degree of safety would be much lower than the degree which would exist if the air brake worked. The presence of the air brake elevates the engine to a standard of safety above the hand brake standard of

safety. It is a standard established by the defendant itself which it must maintain. This is what this statute means by the language "safe to operate in the service to which the same are put" and the further language that the same may be employed in the active service of the carrier without "unnecessary peril to life or limb."

We say that under this statute safety is a relative term. The error into which opposing counsel falls grows out of failing to maintain this distinction. The engine must be safe to operate in the service to which it is put in view of the requirement that all of its appurtenances must be in proper condition. What would have been considered safe in the way of mechanical inventions fifty years ago would be considered very dangerous now. Certainly the railway company cannot complain after having erected its own standard of safety. It seems to us to be a far cry for the railway to claim that a rule of this sort would discourage the railway in putting safety appliances upon its engines.

FURTHER REPLY TO SPECIFIC CONTENTION IN DEFENDANT'S BRIEF THAT AS COMMISSION CANNOT MAKE A RULE REQUIRING SPECIFIC DEVICE WITHOUT A BASIC FINDING THAT THE USE THEREOF IS REQUIRED TO REMOVE UNNECESSARY PERIL TO LIFE OR LIMB THAT IT FOLLOWS THE VOLUNTARY USE OF A DEVICE WHICH COULD NOT ENDANGER THE OPERATION OF THE TRAIN AND THEREFORE COULD NOT CAUSE PERIL TO LIFE OR LIMB WOULD NOT BE THE USE OF A PART WITHIN THE MEANING OF THE LOCOMOTIVE ACT. WE ANSWER THAT THIS REQUIREMENT AS TO BASIC FINDING HAS NOTHING TO DO WITH THE DEFENDANT'S PUTTING DEVICE ON ENGINE; THAT THE VERY RULE OF THE COMMISSION ENCOURAGES THE CARRIER TO ADOPT RULES FOR SAFETY DEVICES; THAT THE CARRIER'S ACT IN PLACING ON ENGINE A NEW DEVICE MAY JUST AS MUCH AS THE

COMMISSION'S ORDERING A NEW DEVICE BE FOR THE PURPOSE OF REMOVING AN UNNECESSARY PERIL; THAT ANY DEVICE PLACED ON ENGINE AGAINST WHAT WOULD OTHERWISE BE A PERIL SUCH AS DERAILMENT OF FRONT TRUCKS MAKES THAT PERIL UNNECESSARY.

In the argument of opposing counsel in the brief accompanying the petition for certiorari, the case of U. S. v. B. & O., 293 U. S. 454, is quoted and counsel argue as follows: "If the commission is without power to make a rule requiring the use of a specific device without a basic finding that the use thereof is 'required to remove unnecessary peril to life or limb,' then it seems to us it necessarily follows that the voluntary use of a device which from its very nature and as shown by the undisputed testimony could not possibly endanger the operation of the train, and therefore could not possibly cause 'unnecessary peril to life or limb,' would not be the use of a part or appurtenance of the locomotive within the meaning of the Act."

We reply to this argument by saying that if the commission is without power to make a rule requiring the use of a specific device without a basic finding that the use of it is required to remove unnecessary peril, still we do not see what this has to do with the right of the railroad to put on a device of its own motion for the purpose of removing unnecessary peril. The very rule of the commission which we have quoted in this brief encourages the carrier to adopt new rules for safety devices. The commission's act in ordering a new device and the carrier's act in placing on a device of its own without a rule of the commission both equally may be to remove an unnecessary peril. Any device placed on the engine to protect against what would otherwise be a peril, such as derailment of the front trucks, would make that peril "unnecessary" if the device removed it.

It is very plain that the act is dealing with two types of appliances on engines. Until the commission acts as to every

conceivable part of the engine there will be parts of the engine upon it placed there under rules and orders of the commission as well as parts placed there by the carrier itself and tolerated and encouraged by the commission. One type of appliance is dealt with under the rules of the commission and constitutes, as we have stated, the minimum requirement. The other type, not required by the commission but encouraged by it, is put on by the carrier equally for the purpose of removing the unnecessary peril. Both must be in proper condition under the language of the act as they are both parts or appliances of the engine. Every class of appliance on the engine must be in proper condition as a maximum requirement.

THE REQUIREMENT OF A PROPER CONDITION IS COMPLETE WITHIN ITSELF. WE KNOW FROM AN INSPECTION OF THE RULES THAT THE INSPECTIONS AND TESTS ARE REQUIRED AS TO COMPARATIVELY ONLY A FEW PARTS; WOULD THIS LAW REQUIRE ONLY A FEW OF THE PARTS OF THE LOCOMOTIVE TO BE IN PROPER CONDITION AND LEAVE ALL THE OTHER PARTS, MANY OF THEM PERTAINING TO SAFETY ALONE (AND SAFETY IS THE MAIN PURPOSE OF THE STATUTE) TO BE IN IMPROPER CONDITION? IS NOT A MORE REASONABLE CONSTRUCTION OF THIS STATUTE TO SAY,—THE NUMBER OF PARTS TO BE IN PROPER CONDITION IS EVERY PART OF THE LOCOMOTIVE WHICH IN ANY WAY RELATES TO ITS SAFETY; THE COMMISSION CAN REQUIRE TO BE INSPECTED EVERY PART OF THE LOCOMOTIVE; IT CANNOT LESSEN THE NUMBER REQUIRED TO BE IN PROPER CONDITION BY MAKING ONLY A FEW PARTS SUBJECT TO INSPECTION AND TEST.

To cut down this requirement of proper condition as to all parts, the language should be clear. The well-known construction of this legislation is liberal in favor of the factor of

safety. Here it is sought to reduce the number of parts in proper condition by a complicated argument and by implication. No express language reduces the requirement of proper condition for all parts to any number less than all the parts on the engine. It is only by a process of reasoning that this is done. We say that the second requirement of inspection and testing before using as to all parts covered by the commission's rules does not leave it in the power of the commission, by inspecting and testing less than all the parts on the locomotive, to reduce the parts required to be in proper condition to less than all the parts.

Certainly where the great purpose of legislation is safety to employees and others, which is to be accomplished by having all parts and appurtenances of the engine in proper condition, a device having safety for its sole purpose should be within those parts required to be in proper condition.

If the first description covers all and the second description does not cover all, shall we not adopt a construction which will reconcile both propositions and allow each to have full effect especially in the interest of safety?

Appliances such as this watchman, having to do with safety alone, come more strongly within the reason of these safety statutes than any other parts of engines. The flanges of the front wheels if not in proper condition will derail the engine. It is a measure of safety to keep the flanges in proper condition under rules adopted for that purpose. Is it not equally within the reason of this law to keep in proper condition a safety appliance actually on the engine, and which will stop the train when the front wheels get off? Both the proper condition of the wheels and the proper condition of the safety appliance pertain to the safety of the train. Having established this standard of safety by placing these appliances on the engine, the defendant should maintain it so far as keeping all parts in proper condition will do so. Employees have a right to insist on this and even passengers and shippers may

patronize a railroad because of the character of its management and rolling stock.

UNDER SAFETY APPLIANCE STATUTES AS TO CARS, IT HAS BEEN HELD BY THIS COURT THAT REQUIREMENT OF "SECURE" HAND HOLDS AND "EFFICIENT" HAND BRAKES WAS SUFFICIENTLY DEFINITE AS A STATUTORY DUTY AND NO ACTION BY COMMISSION COULD LESSEN THE DUTY FIXED IN THE ACT; ALSO IT HAS BEEN SO HELD IN A SECOND CASE QUOTED IN DEFENDANT'S BRIEF; THESE CASES ARE THE ONLY CASES FOUND BY US IN WHICH A CONTENTION SIMILAR TO THAT OF DEFENDANT IN THIS CASE HAS BEEN MADE, AND BOTH DECISIONS WERE ADVERSE TO THAT CONTENTION.

There are a number of safety appliance requirements which depend upon exactly the same principles as this case depends. Section 11 of Vol. 45 U. S. C. A., page 59, provides that all cars must be equipped with secure sill steps and efficient hand brakes, and that all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall be equipped with secure hand holds or grab irons on their roofs at the top of such ladders.

It is provided in Section 12 of Title 45 U. S. C. A., page 63, that the number, dimensions, location, and manner of application of these appliances as designated by the Interstate Commerce Commission shall remain as the standard of equipment, unless changed by an order of the Interstate Commerce Commission to be made after full hearing, and the commission is given authority to modify or change and prescribe the standard height of drawbars and fix the time within which such modification or change shall become effective.

In the case of Illinois Central v. Williams, 242 U. S. 462,

this enactment was construed in a case where a switchman was injured in the act of mounting to the top of a box car when the handhold or grab iron placed at the top of the ladder gave way and caused him to fall. The railway claimed that the section of the act requiring secure handholds or grab irons was suspended until a date after the plaintiff's injury by order of the Interstate Commerce Commission and contended that independently of the action of the commission the provisions of the act which required cars to be equipped with secure handholds or grab irons was not in effect. The Supreme Court of the United States held that this was an independent direct statutory enactment creating an obligation on the railroad to have secure handholds or grab irons, that it required no action of the commission to put it into effect, and the court said:

> "The congressional purpose in enacting Section 2 of the act is very plain. At the time the act was passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure handholds or grab irons on their roofs at the top of such ladders, and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative, duty, of making them 'secure,' and to enforce this duty by appropriately severe penalties."

In the case of W. & A. R. R. v. Meister, 37 Ga. App. 570, which is quoted by opposing counsel, another question very similar to that in this case and in the Williams case was involved. The Safety Appliance Act of 1910, in the same section in which secure sill steps were required, required all cars to be equipped with efficient hand brakes. Meister undertook to stop a car by applying the hand brake and the chains which connected the brake-rod and the brake-staff were loose and disconnected and caused the plantiff, while applying the brake, to lose his balance and fall. The contention was made in that case that inasmuch as the same law required the Interstate Commerce Commission to designate the number, dimensions,

location and manner of application of the appliance required by this law, that the plaintiff must show what rule or regulation of the Interstate Commerce Commission had been made as to the number, dimensions, location and manner of application of the brakes, and that he should show that this had not been complied with. The Georgia court quoted the Williams case in 242 U. S. 462 and held as follows:

> "We can not agree that it was necessary for the plaintiff to allege and prove the violation of any rule of the interstate commerce commission. The authority granted to that tribunal under the provisions above quoted conferred no power to dispense with a compliance with the statute as to the equipment of cars with efficient hand-brakes. Upon this point it was sufficient to allege and prove that the particular car was not so equipped. The plaintiff's right to recover depended upon proof of a violation of the statute, and not of a rule of the interstate commerce commission. While it is the duty of the interstate commerce commission not only to provide for standardization, but also to enforce the provisions of the act (see section 6), a compliance with its orders would not necessarily be a compliance with the statute. *The observance of reasonable regulations promulgated by that authority would in every case be the minimum of what the railroad should do within the law, but might not be the maximum. The commission could not require less than 'efficient hand-brakes.'* Ill. Central R. Co. v. Williams, 242 U. S. 462 (37 Sup. Ct. 128, 61 L. ed. 437)." (Italics ours.)

WATCHMAN COMPARED WITH OTHER SAFETY DEVICES WORKING AUTOMATICALLY

The little watchman was a safety appliance which put the air brake, as operated from the engine, to an additional use. There are many automatic things on the engine which operate when some condition of danger arises. In Napier v. A. C. L., 272 U. S., on page 609, the court enumerated a number of

various devices which the Interstate Commerce Commission required that railroads should equip their engines with. Take the steam gauge,—this shows automatically the pressure of steam. Take the safety valve,—this pops off automatically, as the expression is, when the steam gets to a certain pressure, and thus automatically that dangerous situation of too much pressure is relieved. Take the safety valve for the oil supply pipe, which, as its name implies, must operate under certain specified conditions. In addition to these automatic appliances, consider the fusible plug which was considered in B. & O. v. Groeger, 266 U. S. 521, which is composed of metal which should melt when the heat gets to a certain point and thus allow the steam to escape.

GENERAL CONCLUDING SUMMARY

The little watchman was a safety device which applied the air on an extension of the air line when the front trucks fell by having a frame to strike a trigger when the drop of the truck was two and one-half inches or more, or if the frame moved to one side nine inches.

The watchman's operation depended upon the simplest principles, and any jury could understand it without expert explanation. Photographs and drawings of the device appear in the record.

The wheels of the front truck of this engine dropped from a rail six and three-quarter inches high to the cross tie and ran bumping along the ties seven-tenths of a mile, including many curves and considerable straight track, the track being straight for fourteen hundred feet at one place. Also, at places the wheel marks on the ties showed the truck frame had moved to one side more than nine inches. At the end of seven-tenths of a mile the truck struck a switch, turning the engine over and killing the engineer.

Neither the engineer nor the fireman knew the front trucks were off the track until the final turnover.

The watchman had been in use by the defendant five to seven years; was in use on all passenger engines while in actual service, and on a majority of all engines on this division of defendant.

Defendant's Master Mechanic testified that if trucks got off the track they would drop the height of the rail; that the watchman would have to work if the frame on the truck came in contact with the trigger and connected with the air line.

On this occasion the device failed to function, as all the train crew testified. Had it functioned, the undisputed testimony is that the train would have stopped in six hundred feet.

The defendant took the device off the engine after the wreck and subjected it to test under the supervision of its Superintendent of Motive Power, but introduced no evidence showing the result of the examination and tests.

Although the device was used for five to seven years and on all passenger engines at the time Cox was killed, and was used in regular traffic on this occasion, defendant claimed in its answer that it was a mere experiment and not a part of the engine. The judge in his charge submitted to the jury as to whether the device was a fixed and permanent part of the engine or was a mere experiment, and whether its use as an experiment was such that the decedent as a prudent man was not authorized to have relied on its working on this occasion.

The defendant's contention that other railroads do not use the device was immaterial. The defendant had used it for years; all its passenger engines were equipped with it; it was used in its regular service and under the Locomotive Boiler Inspection Act it was a part or appurtenance of the engine and was required to be in proper condition.

No decided case has held that a carrier's duty under the Locomotive Boiler Inspection Act to have all parts and appurtenances of the locomotive and tender in proper condition applies to less than every part and appurtenance which

is actually on the engine in question, and cases are cited which apply the Locomotive Boiler Inspection Act to such automatic appliances as automatic bell ringers, which are not specified in any rule of the Interstate Commerce Commission. Various cases are examined in this brief.

As to defendant's contention that this appliance did not endanger the locomotive, we say that all the cases recognize that a part or appurtenance of the engine may be a safety device which prevents some dangerous condition from leading to disaster, such as the pop-off valve of a locomotive which releases steam pressure when the engine's pressure gets above the safety limit.

The question of whether the condition existed which would necessarily have made this equipment function was a question for the jury. The judge told the jury that the defendant would not be liable on account of the equipment unless its failure to function was because of its not being in proper condition, and further told the jury that there would be no liability unless the failure to function was not only the result of the equipment's being out of condition but also the failure to function was the proximate cause of the disaster.

There is no complaint of any error in the case except the submission to the jury of the condition of the little watchman under the Locomotive Boiler Inspection Act.

As to defendant's contention that if it had not put this device on the engine there would have been no liability, we say that the defendant is bound by the equipment which it places on its own engine; that the Supreme Court has held that each carrier can determine for itself the type of engine and equipment which it will use; that the defendant had thus elevated itself to a standard of safety with this device on the engine which it must maintain by keeping the device in proper condition.

Defendant contends that because the device was designed to prevent trouble it did not endanger the train and did not,

therefore, come under the Safety Appliance Act, which only covers those things endangering the safety of the train. Our answer is, this contention would eliminate every safety device from the Locomotive Inspection Act; that it would eliminate the pop-off valve which automatically releases steam when it gets to a dangerous pressure; that safety devices are encouraged and are parts and appurtenances of the engine which must be kept in proper condition.

This appliance is but an extension of the use of the air line and brake, and defendant is as much liable if this appurtenance is not in proper condition as if the air brake in the hands of the engineer should be out of condition.

Many appliances on the engine which must be kept in proper condition depend for their operation upon the existence of some condition, such as the steam gauge which depends upon steam pressure, the water gauge which shows how high the water is in the engine, and other like cases, and the question of whether the facts in this case would have made the watchman function if in proper condition was for the jury.

The watchman could have been out of condition in many ways; the air line could have been obstructed; the valve might have stuck; the trigger may have been broken or bent; the frame might have been broken or bent; and any of these things would have caused it to fail to function where the facts were such that had it been in proper condition it would have functioned.

In answer to the defendant's contention that the Locomotive Act does not require a part of the engine to be in proper condition unless the Commission has taken some action in respect to it or specifically requires it to be inspected, we say: The locomotive Act contains two distinct requirements, the first being that it is unlawful to use a locomotive unless all parts and appurtenances thereof are in proper condition, and the second being (as we contend) that it shall be unlawful to use a locomotive unless all parts and appurtenances thereof which are

required by the Commission's rules to be inspected and tested, shall be so inspected and tested before being used. These requirements are separate and independent of each other.

The Interstate Commerce Commission, having been given power to pass rules for inspection and testing of locomotives, has provided in its rules that its requirements for inspection are only the minimum requirements under the statute and that its rules do not prohibit any carrier from enforcing additional rules "tending to a greater degree of precaution against accidents."

The rules of the Commission further require the carrier to inspect all parts of locomotives.

The rules of the Commission constitute the minimum requirements, and the provision of the Act itself that all parts and appurtenances be in proper condition constitute the maximum requirement.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, Deceased, Respondent.

REPLY BRIEF FOR RESPONDENT

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INDEX TO POINTS DISCUSSED IN THE BRIEF WHICH FOLLOWS

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Defendant's brief erroneously claims witness Lunsford only testified to track condition two months after accident. His testimony covers the condition on Sunday after the accident Tuesday, February 14 1-2

Derailment itself evidence of defective condition of track or rolling stock, and Georgia court justified in holding verdict authorized by evidence on each count 2

Defendant's claim that suit was brought under Federal Employers' Liability Act and that hence Boiler Inspection Act could not be relied on, answered, and it is shown Boiler Inspection Act and all other safety appliance acts may furnish grounds for recovery in suits brought under Federal Employers' Liability Law 3

Defendant's claim that pleadings do not specifically allege a violation of Boiler Inspection Act, answered; the facts are all set forth in the pleadings as to the defective condition of the watchman, and plaintiff was not required to set forth the provisions of law applicable to the pleaded facts, as the court takes judicial cognizance of the law 3-4

As to defendant's claim that fireman's evidence was consistent with the watchman working at the time of the actual wreck, we say the record shows that fireman said engineer put on the brake at final derailment and that no member of the train crew ever felt the brake go on at any time before the wreck and after the initial derailment. Evidence on this subject discussed and explained, and it is shown that if watchman were in functioning condition it would certainly have applied the brake within the seven-tenths of a mile after the initial derailment 4-5-6

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Defendant's contention and analysis of the testimony of Goff and Madden, from page 22 through page 27, answered, and it is shown that the physical evidence, including photographs and drawings of watchman and evidence as to the track and height of rail as well as actual facts testified to by Goff (and not his mere conclusions), justified, if it did not require, a finding that the watchman did not function because it was out of condition 6-7

Defendant's contention that the judge's charge was inaccurate in using the expression "negligence" as to failure to comply with the Boiler Inspection Act and as to the judge's charge in taking this up as a separate proposition from the charge of common law negligence, answered, and it is shown that ordinary negligence may be set up under the Federal Employers' Liability Act in the same suit in which a violation of the Safety Appliance and Boiler Inspection Acts is set up; that the liability in each case depends upon different principles, and that the judge can so charge, and quoting a case under Georgia practice which is identical with this case 8

Argument that the evidence showed the watchman would not always work and as to slight verbal inaccuracies in the charge and as to verbal inaccuracies in the decision of the Georgia Court of Appeals in this case, all answered 9-10

Argument that if watchman had never been installed on engine there would have been no liability, and that the device merely failed to interrupt the natural sequence flowing from the derailment, and that future liability

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in derailment cases could be avoided by failing to install the watchman,—all answered 10-11

Rule 106 of Commission required inspection, before each trip, of the brakes on locomotives and tenders to see that they were in safe and suitable condition; that the brake valves should work properly in all positions; that the supply of air is ample. This rule applied to this watchman, which was nothing but an additional automatic use of the air brake 11-12

Plaintiff did not have to plead Rule 106 because the rules of the Commission are required to be known by the court and are as much taken cognizance of when proper facts are pleaded to which they apply as is the general law contained in the Act of Congress. It also appears that Rule 102 requires inspection of every part of the engine 12

Case of Chicago etc. Co. v. Murray, 40 Wyo. 324, quoted on page 49 of supplemental brief, discussed, and that case is strongly in plaintiff's favor in holding that a device not covered by the Commission's rules is still covered by the general language of the Boiler Inspection Act requiring it to be in proper condition 12-13-14

Defendant admits in its brief on page 37 that if it failed to keep the watchman in proper condition by the use of ordinary care, that the common law might have applied to it and made it liable, and the answer to this is that if the common law would apply to it, the provisions of the Boiler Inspection Law equally apply to all that the common law covered, and we quote authorities to sustain this 14-15

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The case of Great Northern Co. v. Donaldson, 246 U. S. 121, holds that failure of the Commerce Commission's inspector to disapprove a particular feature of construction which caused injury to an employee and in not condemning them when inspecting them, did not relieve the carrier from liability for the unsafe condition of such parts, under section 2 of the Boiler Act 15-16

Conclusion of reply brief as to claim that Commission has not acted on watchman 16

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OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, Deceased, Respondent.

REPLY BRIEF FOR RESPONDENT

This brief is in reply to defendant's supplemental brief.

In contending there was no evidence as to a bad condition of the track at the point of initial derailment, defendant claims that witness Lunsford gave evidence of a track condition two months after the accident, his testimony showing two crossties in very bad condition, as see Exhibit E.

On page 6 of defendant's brief it is said that the witness Lunsford did testify that he visited the scene of the derailment Sunday after the Tuesday on which the accident happened but defendant contends on page 6 of brief, "He gave no testimony as to any defective condition of the track discovered by him at either point on that visit." The defendant's contention is that the condition of the track Lunsford was testifying about was on April 10, 1933, when the photographs were taken, Lunsford giving a full description of the

defective condition of the ties on this trip. On page 55 of the record Lunsford testified:

> "The track and the ties and all were in substantially the same condition when Orr took the photographs that they were in when I went there Sunday."

This makes Lunsford's testimony as to the condition of the track in April apply to the condition which he found there on the Sunday after the Tuesday (February 14) on which the accident happened.

Irrespective of this evidence as to the condition of the track shown by Lunsford and the various photographs, the derailment itself was evidence of a defect either in the track or rolling stock.—See Yonge v. Kinney, 28 Ga., page 111.

When we consider the fact that expert trainmen, as shown in our previous brief, testified that they had run over small rocks such as were found at this place, even without any derailment, and when we consider the additional fact that the credibility of the negro child was for the jury, we can see that the Court of Appeals of Georgia and the Supreme Court of Georgia, which refused to grant a writ of certiorari to the judgment of the Court of Appeals, had evidence to sustain the ruling that the evidence justified the verdict on both counts, that is, on the negligent condition of the track, roadbed and right-of-way, as well as on the defective condition of the watchman.

Defendant on pages 19 and 20 of its brief sets forth the averments in each count as to the watchman. The first count relied both upon the defective condition of the track as negligence and the defective condition of the watchman in failing to stop the train after the initial derailment as a violation of its duty under the Locomotive Inspection Act. The second count set forth that a rock caused the initial derailment and

that after that the watchman, because of its improper condition, failed to stop the train as it should have.

Defendant claims that the suit was brought under the Federal Employers' Liability Act. We fail to see how this can be of any benefit to the defendant. The Federal Employers' Liability Act gives a right of action, of course, to the designated beneficiaries through an administrator. It is not confined to liability for mere negligence but recognizes that the carrier is liable for any negligence which causes injury to an employee and that the employee will not be held guilty of contributory negligence or to have assumed the risks of his employment if a violation of the statutes passed for the safety of employees contributed to cause his death. U. S. C. A. Title 45, section 53, p. 379.

Referring to the Boiler Inspection Act in the Groeger case, this court said on page 528 of 266 U. S.:

> "That act was passed to promote the safety of employees and is to be read and applied with the Federal Employers' Liability Act."

On pages 18 and 19 of defendant's brief it is alleged that there was no allegation that failure of the watchman to function was a violation of the Boiler Inspection Act; that the suit was brought solely under the Federal Employers' Liability Act, and on page 53, in attempting to reply to rule 106 which requires all brake valves to work properly in all positions, defendant claims there was no charge in the pleadings of a violation of rule 106.

In reply we state that the rules of the commission are taken judicial cognizance of by the courts just as is the Boiler Inspection Act itself.—See Caha v. U. S., 152 U. S. 211; Casarello v. U. S., 271 Fed. 486, and Napier v. Atlantic, etc., Co., 272 U. S. 605.

A pleader in Georgia (and everywhere else so far as we know) is not required to plead the law but only to plead the facts and the court will apply the applicable law.—See case of Gainesville, etc., Rwy. v. Vandiver, 141 Ga. 360, in which the court said:

> "When a suit is brought against a carrier by an employee on account of an injury sustained in the operation of its locomotive and cars, all that is necessary for the plaintiff to allege is a statement of the facts showing his relation as an employee and the circumstances under which he sustained his injury, showing negligence and a right of recovery; and on the trial of the case, if the plaintiff shows a right to recover under any law of which the court will take judicial cognizance, that law will be applied."

Also, in case of M. K. &.T. Rwy. v. Wulf, 226 U. S. 570, the Supreme Court held that the court would take judicial cognizance of the applicable law to a suit brought by an employee against a carrier and that even though the suit erroneously set forth the State law and claimed rights under it, the court would ignore such claim and enforce the Federal law if the Federal law were applicable.

On pages 21 and 22 of defendant's brief the claim is made that it is consistent with fireman Goree's testimony that the watchman may have actually worked just as the engine turned over, quoting Goree's testimony to the effect that Goree thought the engineer put on the brakes just at the final turnover; that he did not see him but heard the exhaust; that he could not be certain whether the exhaust he heard was the engineer or the little watchman.

As a matter of fact, there is no proof that any brake was put on just before the final derailment. The fireman only thought the engineer put the brake on because he heard the

exhaust, and the court knows that the engineer and fireman both sit in the cab close together. It clearly appears that the noise which the fireman heard was the engineer putting on the brake, his testimony on page 54 being as follows:

> "When we struck the second switch to the left, I heard a big noise; I knew something was wrong then; and as quick as that, I heard the exhaust. You see, it is an exhaust; it comes out from the brake valve, that is where you hear it at. When the engineer applies the guage, that is when I hear that noise. I have heard that noise before. I knew that was the engineer putting the air on, I thought that was what it was; I cannot imagine anything else that it was; but by that time the engine was pretty well off the track. When the brake was put on by the engineer the front of it was already off the track."

The fireman expressly testified that the exhaust which he heard at the final turnover could not have been the exhaust from the little watchman. On page 53 the fireman said:

> "I couldn't say that I saw him apply the brakes; I just heard the exhaust like from the brake valve, that is all. That exhaust could not have been the application of the brakes from this little watchman; I don't know as it would have been exactly the same noise, I don't think it would be quite that way."

It will be observed that the fireman was sitting in the same cab with the engineer and the air lever in the engineer's hand took effect on the valve up in the cab and that is where the fireman would have heard the exhaust. The exhaust from the little watchman was something like thirty or forty feet in front and under the body of the engine, and it would not look very reasonable that it could have been heard.

At all events, this hearing of the exhaust only occurred at the time the engine finally turned over. The place where

the little watchman should have functioned, if it had been in order, would have been at the point of initial derailment.

None of the train crew felt any brake put on at all; neither did Goree. The picture of the engine shows it turned completely over and must have been disconnected from the cars. The breaking of the air brake line would cause an exhaust and it is common knowledge would in itself put on the brakes, but this all occurred at the time of the wreck.

But if the watchman were in functioning condition, why did it not function somewhere in the seven-tenths of a mile after the first derailment? It should have operated instantly when the front trucks fell 6¾ inches to the crossties. Yet it failed to operate for that entire seven-tenths of a mile although the conditions demanded its operation if it were in good condition.

The jury were amply justified in finding that it never operated at all anywhere and that the defendant, having inspected it and tested it after the wreck and having produced no evidence as to its condition, virtually abandoned any claim that it functioned.

On pages 22, 23, 24, 25, 26, and 27 of the brief opposing counsel quote largely from Goff's testimony. The facts testified to by Goff were all in plaintiff's favor. His claim that the action of the watchman was at times uncertain related to the effect of curves, which, of course, could have effect only upon the lateral operation of the watchman. He said sometimes a curve would set the watchman (opposing brief page 23) but he agreed that a vertical drop would set it if it dropped 2½ inches, (see opposing brief page 23) and he admitted the truck would drop the height of the rail which is 6¾ inches. See record p. 77, 80, 81.

It was for the jury to evolve the truth out of all this voluminous testimony.

The photographs and drawings of the watchman were in the record and the jury could conclude that under the circumstances there was plenty of contact with the trigger in both a vertical fall of the truck and in a side movement of the truck to apply the watchman.

If any brake had been put on at all, either service or emergency application, the whole crew, including the engineer, would have known it. It would have disclosed trouble and would have resulted in a stoppage not only from the watchman itself but the engineer would have had opportunity also to put on the brake. The air brake in emergency is accessible even to the conductor and train hands, as a matter of common knowledge.

On page 27, after quoting Goff's evidence and that of Madden, the superintendent, opposing counsel argue that that is all the testimony regarding Wright's little watchman. Counsel leave out entirely the photographs and the drawings and the character of the track and the marks thereon.

No witness is bound by all the conclusions and contradictions of any witness put on the stand, even though he may put him up himself. The court can see that the plaintiff put up one of the high officials of the defendant company. If there is a conflict between his conclusions that the watchman is an experiment and the facts which he details as to its use for seven years and its presence on every passenger engine, it is for the jury to decide on that conflict. There is no technical estoppel on anybody. We can argue the truth from whatsoever source it appears. There may be a fragment of it from one witness and a fragment from another, and some of it from physical evidence. There is no hide-bound rule that either side must swallow whole any witness he may put up, no matter how it may conflict with common sense or the facts.

Beginning on page 28 the defendant's brief complains of the judge's charge in general terms and says that plaintiff's petition did not allege a violation of the Boiler Inspection Act, and that the judge took this up as a separate proposition from the charge of negligence.

This case was tried in the State court under the State rules of pleading and practice.

Under the Federal Employers' Liability Act, ordinary negligence may be set up and violation of the Boiler Inspection Act or the Safety Appliance Act or similar Federal requirements may be set up. The liability, however, is dependent upon different principles as to the violation of duty under the general charge of negligence and under the Federal appliance acts. B. and O. R. R. v. Groeger 266 U. S., p. 528—Chicago, etc., Co. v. Murray, 40 Wyo. 324.

In W. & A. v. Townsend, 36 Ga. App. 70, this practice of submitting separately these charges of negligence was approved and the charge of the judge below followed the charge in this Townsend case. The court will see, under headnote 5, that the court in that case charged the general law applicable to negligence and the diminution of damages because of the decedent's negligence, and under headnote 6 the court held that as to the Federal Safety Appliance Act the plaintiff could recover full damages irrespective of contributory negligence. In the statement of facts in this case the court say:

> "In the first count liability was predicated on a violation of the safety-appliance act, it being alleged that a defective air-brake caused the brake-shoe to stick, heating a wheel, and thereby causing its collapse, with the consequent derailment of the train. The second count was predicated upon negligence on the part of the defendant, alleging failure to inspect and repair the brakes, and misconduct on the part of the engine crew in failing to stop the train," etc.

It is argued that the device (watchman) did not always work. That may be said of almost any device. But in this case, with a sheer fall from the height of the rail, 6¾ inches, there has never been any reply to the proposition that the trigger should have been forced down. There is no question of curves in a sheer drop. At least this was a question for the jury.

Slight verbal inaccuracies in the charge may be found, as shown on page 31 of opposing brief, where the judge told the jury that if a device was only an experiment and it had not been in general use on this railroad a sufficient length of time to be a fixed device, and if its use was such that the decedent could not rely on it, that then its failure to function would not be negligence and the defendant would not be liable for its failure to operate properly.

This word "negligence" in this connection as shown by the context could mean simply a failure to operate properly. In many of the decisions, and especially in one of the cases from the Supreme Court quoted in our brief, namely the decision of Chief Justice White in Railroad v. Gotschall, 244 U. S. 66, the failure of this safety appliance to operate, under the act of Congress, is called negligence, but it is a mere general way of describing the failure to keep the appliance in proper condition.

The meaning of the judge was too clear to admit of any doubt in this charge. There is no doubt that the judge charged that as to this device there was an absolute requirement that it should be in proper condition. If there was any error in charging that the defendant must be negligent in respect to it, it was an error in favor of the defendant and not against the defendant. No defendant can complain of an error in his favor.

Verbal criticism on pages 32 and 33 is made of the decision

of the Georgia Court of Appeals, it being claimed that after quoting section 2 of the Boiler Inspection Act and confusing that as an amendment of the Federal Employers' Liability Act rather than an amendment of the Safety Appliance Act, the appellate court said the duty to keep their locomotives and all parts and appurtenances thereof free from defects is absolute.

This latter proposition is the important and substantial thing, and the Court of Appeals clearly decided the law when they held that this appliance, being a part and appurtenance of the engine, must be in proper condition at all times.

The court did not make any mistake in its reference to this act except that it referred to the act of April 22, 1908, as amended in 1911 and 1915, as the "Federal Safety Appliance Act," instead of "Boiler Inspection Act," and then quoted the language of the law (the Boiler Act) correctly. What difference does it make that the court did not call it the Boiler Inspection Act? It is not now a mere "boiler" act but is a locomotive act. The court referred correctly to the date of the passage of the amendment, quoted its language correctly and referred to its correct place in U. S. C. A. and gave it the correct construction.

The only error in the charge was in favor of the defendant in submitting to the jury the question as to whether this device was an experiment. The uncontradicted evidence shows that it was not an experiment. No case can be found in the books where a device, which is made a working part of all the passenger engines on a railroad, has been classified as an experiment rather than a part or appurtenance of the engine.

The defendant's argument beginning on page 35 of its brief repeats the argument that if the watchman had never been on this engine the same accident would have happened and yet there would have been no liability.

Defendant overlooks the proposition that it is given the right to select its own type of locomotive; that it creates its own standard of safety by the appliances which it places on its own locomotive; and that the Boiler Inspection Act, in requiring all parts and appurtenances on the entire locomotive to be in proper condition, applies to each particular locomotive of every type which the defendant has.

It is argued that the device merely failed to interrupt the natural sequence flowing from the derailment. So do we say the air brake in the hands of the engineer merely fails to interrupt the sequence, but if it were out of order there would be liability. So does the pop-off valve fail to interrupt the sequence from rising steam pressure, but there would be liability if it failed to work and the boiler exploded.

The brief then suggests that in order to escape liability in future cases for derailments of front trucks, all the defendant would have to do would be to remove the little watchman and thus lower its standard of safety.

The employees and persons dealing with the company then would also know where they stood. Employees acquire a right in the kind of instrumentalities which the employer furnishes them. It is for their safety that these laws are passed, and the laws say that whatever is on that engine as a part and appurtenance must be in proper condition.

On page 60 of the rules (Rule 106) of the commission the brake system of the locomotive is dealt with and the rule provides that it must be known before each trip "that the brakes on locomotive and tender are in safe and suitable condition for service; that the air compressor or compressors are in condition to provide an ample supply of air for the service in which the locomotive is put; that the devices for regulating all pressures are properly performing their functions; that

the brake valves work properly in all positions; and that the water has been drained from the air-brake system."

The watchman was nothing but an automatic brake. It worked on the same air brake line that the engineer's brake handle worked on. This rule requires the entire brake to be in good condition and defendant had made this watchman a part of that brake on the locomotive. It was required that the brake valves work properly in all positions. Practically the whole of the watchman was the brake valve because the trigger which would be tripped was attached to that valve.

Defendant in its brief on page 53 complains that there was no charge in the pleadings of a violation of rule 106. We have already shown that the law and the rules of the commission are required to be known by the court. We pleaded that the watchman was in a defective condition and would not function. We proved that the conditions were there which would have made it function, if it had been in good condition. Thus we have a specific rule of the commission applicable to the watchman which was but a part of the brake system of the engine, and we have also a general rule (102) which applied to every part of the engine and required its inspection.

Defendant quotes, page 49 of brief, the case of Chicago, etc., Co. v. Murray, 40 Wyo. 324, 277 Pac. 703, 706. That was a case where an engineer used a reach rod which connected with the sand box as a handhold to climb on the engine. It was defective and he was injured. The railway claimed that it was not being used as contemplated, that is, as a mere lever but the engineer replied it was customary to use it as a handhold in climbing. The court used the language quoted in defendant's brief. It appeared that the sand was applied in two ways,—one automatically by an air compressor which moved the sand out by pressure, and the other was this

particular rod which merely opened a valve and allowed it to come out by gravity. The court quoted the rule of the commission and held in substance that rule 120 only applied to the air compressor which removed the sand from the sand dome. The court referred to the removal of the sand by the hand lever as customarily resorted to when the air sander (the automatic air pressure apparatus) would not work and is referred to as "an emergency or secondary method." The decision then proceeds to state that the hand sander is controlled from the cab of the locomotive by a movement by hand of a reach rod and said, after quoting rule 120, "But the hand sander was only a secondary sanding apparatus, and there was no evidence that the air sander was not in safe and suitable condition and a sufficient compliance with the rule." The court then went ahead to say that the Boiler act itself applied to the reach rod of the hand sander for it was one of the parts or appurtenances of the locomotive, the court using the following language on page 706:

> "But the reach rod of the hand sander was one of the parts or appurtenances of the locomotive which, by section 2 of the Boiler Inspection Act, the carrier was bound to keep in proper condition and safe to operate in the service to which the same are put, and it becomes necessary to inquire as to the meaning of those words in their application to the case at bar."

The court, it will be thus seen, applied the general requirement of the Boiler Inspection Act to this hand sander, although it was not covered by the rules of the Commission, and the court, after the quotation just made, proceeded to quote from the Groeger case as showing that the standard as to being in proper condition and safe to operate, etc., was not too indefinite to be applied.

The court, however, did reverse the decision below on the ground that the court below charged the jury that it was

the carrier's duty to keep the reach rod hand sander safe for use as a hand hold, in climbing, if such use was reasonable, the court holding that the carrier would not be required to keep the rod in proper condition for such a use unless the carrier knew that the rod was customarily used as a hand hold or that it ought to have anticipated such use.

Defendant claims in its brief that with respect to the watchman the defendant might have been liable under the common law for failure to exercise ordinary care in keeping it in repair, if the evidence had justified such a finding. See defendant's supplemental brief p. 37. We say that this contention by the defendant would require the court to apply the standard of the Boiler Act and not the common law.

In the case of B. & O. v. Groeger, 266 U. S. on page 528, this court said:

> "By the last mentioned section (and section 2 of the Boiler Act was the section which was being construed), defendant was bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide."

In the case quoted by the defendant of C. B. & Q. v. Murray, from Wyoming, reported in 40 Wyo. 324 and 277 Pac. 703, the court, on page 708 of 277 Pac. Rep., used the following language:

> "The phrase 'in the service to which the same are put', as contained in section 2 of the Boiler Inspection Act, must be taken to mean the service for which the appliance is designed, or to which it is put with the employer's knowledge and acquiescence. The common law duty to exercise ordinary care to keep appliances reasonably safe for such purposes has, by the statute, become an absolute duty to keep them safe for the same purposes."

Words could not better explain the fact that if the common law ever applied to this watchman, as the defendant in its brief on page 37 admits is the case, the Boiler Inspection Act equally applies to it.

The defendant's contention that failure of the Commission (and of course the court will understand it is our contention the Commission has covered the watchman by rules 102 and 106) to require or deal with any part or device on an engine relieves the carrier from the effect of the Boiler Inspection Act is really squarely decided against the defendant by this court in the case of Great Northern, etc., Co. v. Donaldson, 246 U. S. 121, in which a locomotive engineer was killed by the explosion of a boiler, and it was contended that the engine was not in proper condition under the Boiler Inspection Act because of the use of crown bolts with large button heads. It was contended by the carrier that the Federal boiler inspectors, who acted under the Commission's orders, did not disapprove these buttons when they inspected the engine, and the Supreme Court made the following statement:

> "Nor can we agree with the contention of the plaintiff in error that, so long as the large button head had not been disapproved by the government inspector, such fact is conclusive of the sufficiency of the type in use. We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the Federal boiler inspector."

The effect of the foregoing decision is to say that mere negative action of the Commission, that is, failure to disapprove a feature of construction when inspected by the Federal boiler inspector, does not relieve the carrier for an unsafe locomotive, under section 2 of the Boiler Act.

So we say a mere failure to cover all the parts of the locomotive by the Commission's rules does not approve either the presence or the condition of other features of the locomotive not dealt with.

Surely it is not to be considered that as to those parts of a locomotive as to which the Commission has made no requirements, this statute allows them to be in dangerous condition or not in proper repair. The argument of the defendant would lead to the result that there is no requirement as to proper condition of any part of the locomotive unless the Commission has either designated its dimensions, contents and architecture or required it to be inspected, or tested, and this in the face of the proposition that this court, in all of its decisions, has recognized that the Commission has not covered anything like the whole ground as to parts and appurtenances of locomotives but instead the Commission has left the main architecture of the locomotive and its type to the discretion of the carrier and has provided in its own rules that they are the minimum requirement and that the carrier is encouraged to make its own rules in the interest of safety.

Respectfully submitted,

REUBEN R. ARNOLD,
B. P. GAMBRELL,
T. D. ARNOLD,

Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, deceased, Respondent.

PETITION FOR REHEARING

REUBEN R. ARNOLD,
Counsel for Respondent.

IN THE

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PETITION FOR REHEARING

Now comes the above named Olivia Cox Lunsford, administratrix of the estate of J. M. Cox, deceased, and presents this her petition for rehearing of the above entitled cause (in which judgment of reversal was rendered March 2, 1936), and in support thereof respectfully shows:

1.

Respondent urges that the only evidence in the record that the watchman was an experiment was that of Madden, superintendent, which was a statement of said Madden not subjected to cross-examination but admitted in evidence by agree-

ment (record page 93), and that the other evidence as to an experiment was that of Goff, petitioner's master mechanic (record page 74); that the conclusions of both of these witnesses were mere conclusions and in themselves were of no more value as evidence than if a witness for the respondent had testified that under the facts stated the watchman was not an experiment; that the question of whether the watchman was an experiment should be determined by the facts as to the appliance, which are shown by the photographs in the record, by the drawings in the record, and by the evidence of the witness Goff (beginning on page 74) and of the witness Goree (record page 48); that these facts as to the existence, application, and use of the watchman should control rather than the conclusions of two interested witnesses,—one, defendant's superintendent, and the other, defendant's master mechanic; that these facts showed that the appliance had been used for from five to seven years and was in use on all defendant's passenger engines on that division; that the use of the same was increasing; that the same was used on these engines in service out upon the railway in the transportation of passengers and freight; that employees in train service knew of the presence of this appliance upon engines; that it was a use of the air brake line upon the contingency that the front trucks jumped the track; that it applied the air just as any other valve being opened applies the air, and upon the same principle that it is applied from the engineer's seat in the cab; that employees had a right to rely upon its working; that petitioner's liability grows out of the fact that this fixture on the engine became a part and appurtenance thereof; that as to its being in an experimental stage, many of the other appliances (even considered standard appliances) upon the locomotive are doubtless in an experimental stage, as the inventions of science are constantly causing changes in equipment for better things which are discovered; that the master mechanic had testified the front truck would drop, in case of derailment, the height of the rail to the ties; that if the frame-

work came in contact with the trigger of the watchman it would appear that it would have to work and set the brakes (see record pages 77, 80, 81), and petitioner introduced no evidence as to the condition of watchman after the wreck.

2.

Respondent submits that the question of whether the conclusion drawn by the witnesses Goff and Madden that this appliance was an experiment was justified by the evidence became a question of fact for the jury under all the circumstances in the case, and that the judge fairly submitted to the jury the issue made by defendant's answer that the watchman was an experiment, and that the judge ch ged the jury that if its use was simply as an experiment and the decedent was not authorized, as a reasonably prudent man, to rely on its operation at this time, its failure to work or perform its functions could not be charged against the defendant as negligence and defendant would not be liable for a failure on the part of the device to work properly (record pages 148, 149); and the judge's charge to the jury that the appliance was required by the Boiler Inspection Act to be in proper condition was based upon the proposition that if the jury should find that it became a fixed and permanent part of the locomotive, that it was held out to the decedent as a reliable device and that it could be relied upon to function and that any prudent man would have relied on the device under all the circumstances of the case, and that it had been used so generally and for such length of time that it became a part and appurtenance of the engine (as see the record page 149),—that in these events and under these conditions, the Boiler Inspection Act would apply. Respondent submits that under the circumstances, the submission of this contention to the jury as a question of fact was all that the petitioner was entitled under the law to ask. Respondent submits that the language in the opinion, "Upon the evidence, beyond reasonable doubt, the watchman was in the experimental stage," is a recognition that

this proposition depended on the evidence. It is our contention, respectfully submitted, that substantial evidence in favor of the plaintiff, upon this issue, was sufficient to authorize submission of this issue to the jury under proper instructions, which, we contend, were given, upon evidence as above shown, and that having been thus submitted, the verdict in favor of the plaintiff should not be disturbed, and respondent here quotes a portion of the charge (as appears on pages 148 and 149 of the record and on page 15 of respondent's principal brief):

> "The defendant contends that the device known as Wright's Little Watchman is really in an experimental state, that it was in use at the time as an experiment only, that it was not perfected, that it would work sometimes and at other times it would not, and therefore it was not used as a permanent part of the locomotive. I charge you on this question that if you find from the evidence (and that is purely a question for you) that this device known as Wright's Little Watchman had not been in general use on this road, or on other roads, for a sufficient length of time to be a fixed and permanent and reliable device for the purpose for which it was used, and that its use, as contended, was simply an experiment, and this limited or experimental use was such that the decedent did not and was not authorized as a reasonably prudent man to rely on the working and operation of this device at this particular time, then in that event the failure of this device to work or to perform its functions would not be charged against the defendant as negligence, and the defendant would not be liable for a failure on the part of this device to operate properly."

3.

Respondent respectfully insists that petitioner's contention on page 37 of its supplemental brief as follows: "We do not

contend that where the railroad voluntarily installs on a locomotive a device not required by the Commission's rules, it would not be liable under the negligence rule of the Employer's Liability Act if negligent installation or negligent failure to maintain should proximately cause injury,"—would require application of the Boiler Inspection Act to the same device under the following language of the decision in B. & O. R. R. v. Groeger, 266 U. S. on page 528, which lays down as to section 2 of the Boiler Inspection Act, "By the last mentioned section defendant was bound absolutely to furnish what before under the common law it was its duty to exercise ordinary care to provide."

4.

Respondent respectfully submits that the watchman was a part of the locomotive; that it was an adaptation of the air brake to an additional definite use; that train employees, who were more closely concerned than any others, were given no notice that this appliance was an experiment upon which no reliance could be placed; that it had been used for years; that it was on all passenger engines; and it is respectfully contended that the rule on page 60 of the Commission's book of rules (page 23 of brief) reading as follows:

> "It must be known before each trip that the brakes on locomotive and tender are in safe and suitable condition for service; that the air compressor or compressors are in condition to provide an ample supply of air for the service in which the locomotive is put; that the devices for regulating all pressures are properly performing their functions; that the brake valves work properly in all positions; and that the water has been drained from the air-brake system;"

—applies to said appliance, and that rule 102 (page 21 of brief) reading as follows:

> "The mechanical officer in charge, at each point where repairs are made, will be held responsible for the inspection and repair of all parts of locomotives and tenders under his jurisdiction. He must know that inspections are made as required and that the defects are properly repaired before the locomotive is returned to service,"

—applies to said appliance, and also, that irrespective of said rules, the language of the Boiler Inspection Act, in requiring all parts and appurtenances of locomotive and boiler to be in proper condition, applies to the watchman.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Court of Appeals of Georgia be, upon further consideration, affirmed.

Respectfully submitted,

REUBEN R. ARNOLD,

Counsel for Olivia Cox Lunsford, Administratrix Estate of J. M. Cox, deceased, Respondent.

CERTIFICATE OF COUNSEL

I, Reuben R. Arnold, counsel for the above named Olivia Cox Lunsford, administratrix of the estate of J. M. Cox, deceased, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Reuben R. Arnold

Counsel for Olivia Cox Lunsford, Administratrix Estate of J. M. Cox, deceased, Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 399.—October Term, 1935.

Southern Railway Company, Petitioner, *vs.* Mrs. Olivia Cox Lunsford, as Administratrix of the Estate of J. M. Cox, Deceased.	On Writ of Certiorari to the Court of Appeals of the State of Georgia.

[March 2, 1936.]

Mr. Justice McReynolds delivered the opinion of the court.

Respondent's intestate, J. M. Cox, driver of the engine on petitioner's fast train from Birmingham to Atlanta, lost his life when it overturned. As the train moved forty miles per hour over a six degree curve to the left, something, apparently a stone, turned the wheels of the front truck to the right and off the rails. After bumping over the cross ties for seven-tenths of a mile they struck a switch and the upset followed.

The front or boiler end of the locomotive found support through a rigidly attached center casting rounded to fit, some three or four inches, into another casting made fast to the forward truck. This adjustment permitted passage around curves. The parts were held together by the weight of the locomotive. If the wheels of the truck left the rails the connection would be broken; the locomotive would rest on the driving wheels and short chains attached to it would pull the truck along. Compressed air carried in a hose pipe from the pump, controlled all brakes. Pressure released them; when withdrawn, they automatically applied.

A mechanism, known as Wright's Little Watchman, fastened beneath the locomotive frame, carried a valve closing an entrance into the air line actuated by a lever or trigger. A pull on this would open the valve, let out air and thus set the brakes. The lever was connected with the forward truck; if its wheels left the track and fell five inches or more a downward pull was expected.

Newly constructed locomotives carry no Watchman; they are not in common use. Petitioner buys and applies them; has experimented

with them for seven years; nearly all of its passenger locomotives carry them. The device is not regarded as an essential or integral part. The carrier's General Superintendent testified without contradiction—"The use of this device cannot possibly endanger the operation of the train. It is used in the hope that it may apply the brakes and stop the train in event of derailment of front trucks. My experience with this device is that it sometimes works and sometimes will not work, and that it cannot be relied upon with any degree of certainty." Both witnesses who spoke to the point asserted that it was in an experimental stage; was being tried out with the hope of securing good results; sometimes it had proved effective, sometimes it disappointed. Notwithstanding use during seven years, it remained experimental.

Respondent brought an action for damages in a State Court and relied upon two grounds—(1) failure properly to maintain the track, (2) failure to keep the Watchman in proper condition wherefore it failed to function and arrest the train. The court presented the cause to the jury upon both theories. Judgment for respondent after a favorable verdict was affirmed by the appellate court. Discussion of the first ground is unnecessary; the judgment must be reversed because of error in the charge relative to the second.

The Boiler Inspection Act of June 7, 1924, c. 355, § 2, 43 Stat. 659, U. S. C. A., Title 45, § 23, provides—

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

This enactment has been much considered. *Baltimore & Ohio Railroad Co.* v. *Groeger*, 266 U. S. 521; *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U. S. 605; *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454. But we have not heretofore

undertaken to give definite interpretation to the words "parts and appurtenances".

The accepted doctrine is that the Act imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril to life or limb. Also, that, after proper inquiry, the Interstate Commerce Commission may "prescribe the rules and regulations by which the fitness for service shall be determined."

The Commission has promulgated no rule mentioning Little Watchmen; they are not subjected to inspection; without them locomotives "may be employed in the active service . . . without unnecessary peril to life or limb." While most carriers do not use them their locomotives commonly are in "proper condition."

Respondent does not suggest that the Watchman, whether operative or not, detracted from safety or in any way contributed to the derailment. But it is said that in the circumstances shown the mechanism failed promptly to stop the train, and the jury was at liberty to find faulty condition which caused the engineer's death. The soundness of this reasoning we need not consider; certiorari was granted because of another point.

Upon the evidence, beyond reasonable doubt, the Watchman was in the experimental stage. Use during seven years gave it no other status, as the witnesses pointed out. Nevertheless, the claim is that when attached it became a part or appurtenance which the carrier was absolutely bound properly to maintain.

With frankness, counsel assert: "There is no doubt that the judge charged that as to this device there was an absolute requirement that it should be in proper condition." In support of this, they urge: The carrier "creates its own standard of safety by the appliances which it places on its own locomotive; and that the Boiler Inspection Act, in requiring all parts and appurtenances on the entire locomotive to be in proper condition, applies to each particular locomotive of every type."

We are unable to accept this view. With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability. So to hold would hinder commendable efforts to better conditions and tend to defeat

the evident purpose—avoidance of unnecessary peril to life or limb. Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability.

The charge in the particulars indicated was erroneous and prejudicial.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.